FILED
NOV 11 1955
HAROLD B. WILLEY, Clerk

# Supreme Court of the United States

**OCTOBER TERM, 1955**

**No. 513**

UNITED STATES OF AMERICA, *ex rel.*
JUSTIN K. McCARTHY,

*Petitioner,*

v.

HAROLD H. COOK, Lt. Col., U. S. A., Commanding Officer, United States Air Force, Induction Center, Schuylkill Arsenal, Philadelphia, Pa., and ROBERT T. STEVENS, Secretary of the Army,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS D. McBRIDE
2015 Land Title Building
Philadelphia 10, Pennsylvania

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

*Counsel for Petitioner*

# INDEX


| | PAGE |
|---|---|
| Opinion Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes and Regulations Involved | 4 |
| Statement of Case | 5 |
| Reasons for Granting Writ | 27 |
| Preliminary Summary | 27 |
| Conclusion | 63 |
| Appendix A—Opinion | 65 |
| Appendix B—Judgment | 81 |
| Appendix C—Order Petition for Rehearing | 82 |
| Appendix D—Selective Service Material | 83 |
| Appendix E—Local Board Memorandum No. 38 | 91 |


## Table of Cases Cited


*Arndt* v. *United States*, 5th Cir., 1955, 22 F. 2d 484... 56

*Bates* v. *United States*, 348 U. S. 966 (1955) ..... 52
*Bejelis* v. *United States*, 6th Cir., 1953, 206 F. 2d 354.. 57
*Berman* v. *Craig*, 3rd Cir., 1953, 206 F. 2d 888 ..... 57

*Cox* v. *United States*, 332 U. S. 442 (1947)..... 62
*Cramer* v. *France*, 9th Cir., 1945, 148 F. 2d 801 ..... 38

*Davis* v. *United States*, 6th Cir., 1952, 199 F. 2d 689.. 57
*De Moss* v. *United States*, 349 U. S. 918 (1955) ..... 52
*Dickinson* v. *United States*, 346 U. S. 389 (1953)..43, 52, 56

*Estep* v. *United States*, 327 U. S. 114 (1946)..37, 52, 57, 62

*Fabiani, Ex Parte*, E. D. Pa., 1952, 105 F. Supp. 139 .. 57
*Franks* v. *United States*, 9th Cir., 1954, 216 F. 2d 266.38, 39

*Gonzales* v. *United States*, 348 U. S. 407 (1955) ....55, 56

PAGE

*Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633 ..... 51

*Knox* v. *United States*, 9th Cir., 1952, 200 F. 2d 398..38, 39
*Kotteakos* v. *United States*, 328 U. S. 750 (1946) .... 56

*Lancaster* v. *United States*, 1st Cir., 1946, 153 F. 2d 718 ..... 54
*Lockheed Aircraft Corporation* v. *Rathmon*, S. D. Cal., 106 F. Supp. 810 ..... 30

*McLean* v. *United States*, 226 U. S. 374 (1912) ..... 43
*Mintz* v. *Howlett*, 2d Cir., 1953, 207 F. 2d 758 ..... 39

*Niznik* v. *United States*, 6th Cir., 1950, 184 F. 2d 972 48
*N. L. R. B.* v. *Cherry Cotton Mills*, 5th Cir., 1938, 98 F. 2d 444 ..... 57
*Northern Pacific Co.* v. *Washington*, 222 U. S. 370 (1912) ..... 43

*Oceanic Steam Navigation Co.* v. *Stranahan*, 241 U. S. 320 (1909) ..... 43

*Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93 .... 62

*Simmons* v. *United States*, 348 U. S. 397 (1955) ....55, 56
*Sterrett* v. *United States*, 9th Cir., 1954, 216 F. 2d 269 52

*Talcott* v. *Reed*, 9th Cir., 1954, 217 F. 2d 360 ..... 61
*Tyrrell* v. *United States*, 9th Cir., 1952, 200 F. 2d 8.. 38

*United States* v. *Derstine*, E. D. Pa., 1954, 129 F. Supp. 117 ..... 61
*United States* v. *Graham*, N. D. N. Y., 1952, 108 F. Supp. 794 ..... 57
*United States* v. *Laier*, N. D. Cal., 1943, 52 F. Supp. 392 ..... 61
*United States* v. *Peebles*, 7th Cir., 1955, 220 F. 2d 114..38, 39
*United States* v. *Peterson*, N. D. Cal., 1944, 53 F. Supp. 760 ..... 61
*United States* v. *Romano*, S. D. N. Y., 1952, 103 F. Supp. 597 ..... 61
*United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90, 39, 48, 57

*Ver Mehren* v. *Sirmyer*, 8th Cir., 1929, 36 F. 2d 876.. 57

## Other Authorities Cited

PAGE

14A Corpus Juris 1428 ..... 30

Federal Rules of Criminal Procedure:
Rule 37 (b) (2) ..... 2
Rule 45 (a) ..... 2

House Report No. 271, 82d Cong., 1st Sess., 1951, U. S. Code Congr. Service, Vol. 2, pages 1472, 1500 ....41, 43

Local Board Memorandum No. 38...49, 91, 92, 93, 94, 95, 96

Selective Service Regulations:
Section 1604.52 [32 C. F. R. § 1604.52] ..... 34
Section 1604.52 (b) [32 C. F. R. § 1604.52 (b)]... 35
Section 1622.15 [32 C. F. R. § 1622.15]....5, 45, 86, 87
Section 1622.25 [32 C. F. R. § 1622.25], 5, 45, 87, 88, 89, 90, 91
Section 1622.50 [32 C. F. R. § 1622.50] .....5, 51
Section 1624.2 [32 C. F. R. § 1624.2] .....53, 61
Section 1624.3 [32 C. F. R. § 1624.3] ..... 46
Section 1625.14 [32 C. F. R. § 1625.14] ..... 46
Section 1626.41 [32 C. F. R. § 1626.41] ..... 46

Title 28, U. S. C.:
Section 1254 (1) ..... 2
Section 1331 ..... 2

Universal Military Training and Service Act, 50 U. S. C. App. Sections 450, *et seq.* .....1, 4, 39, 43
Section 4 (a) [50 U. S. C. App. § 454 (a), 66 Stat. 509] .....4, 40, 83
Section 6 (h) [50 U. S. C. App. § 456 (h), 65 Stat. 53] .....4, 40, 45, 51, 83, 84
Section 6 (i) (1) (2) [50 U. S. C. App. § 456 (i) (1) (2)] ..... 45
Section 10 (b) (3) [50 U. S. C. App. § 460 (b) (3), 65 Stat. 87] .....4, 30, 32, 34, 84, 85, 86

# Supreme Court of the United States

**OCTOBER TERM, 1955**

**No.**

---

UNITED STATES OF AMERICA, *ex rel.*
JUSTIN K. MCCARTHY,

*Petitioner,*

v.

HAROLD H. COOK, Lt. Col., U. S. A., Commanding Officer, United States Air Force, Induction Center, Schuylkill Arsenal, Philadelphia, Pa., and ROBERT T. STEVENS, Secretary of the Army,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

*To the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, remanding petitioner to the custody of the respondents under the Universal Military Training and Service Act and holding that the procedural rights of petitioner under the act had not been denied.

## Opinion Below

The opinion of the court of appeals is reported at 225 F. 2d 71. It is printed as Appendix A to this petition. The district court wrote no opinion. The order of the district court appears in the record. (R. 85)

## Jurisdiction

The judgment of the court of appeals was entered on May 23, 1955. (See Appendix B to this petition.) A petition for rehearing was filed. It was denied on August 15, 1955. (See Appendix C to this petition.) The time for filing this petition for writ of certiorari expires November 13, 1955. It is filed within the time. The jurisdiction of this Court is invoked under Title 28, U. S. C. § 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure. The district court had jurisdiction under Title 28, U. S. C. § 1331.

## Questions Presented

I

When the record showed that the geographical jurisdiction of the local board, not a proper intercounty board, illegally took in parts of two contiguous counties, had only one board member from the county of petitioner's residence and had two illegal non-resident board members, are the classifications, actions and orders illegal because the formation of the local board and the membership of it are in defiance of the statute

and the regulations so as to constitute a denial of procedural due process of law to petitioner?

II

Did the court below commit reversible error when it held that the denial of procedural due process of law by the local board, because of the illegal geographical jurisdiction of the local board and the illegal membership, was cured by the *de novo* classification by the appeal board?

III

When the record showed that petitioner was granted a deferment for a short period of time, but during the last year of law school it was taken away and petitioner classified as liable for training and service before his twenty-sixth birthday and mailed an order to report for induction which was later postponed, was the liability of petitioner thereby extended under the act until his thirty-fifth birthday?

IV

When the record showed that petitioner was reclassified after he reached his twenty-sixth birthday by the local board and later by the appeal board thereby denying him the over-age classification, even though his liability had not been extended until his thirty-fifth birthday, was the denial of the over-age classification without basis in fact so as to make the final I-A classification by the appeal board arbitrary and capricious?

V

When the record showed that petitioner's every request for a personal appearance was at all times denied him, and the local board later held a preclassification interview only before the last classification after the ground for deferment as a student had expired, contrary to law, was petitioner denied procedural due process of law in violation of the regulations?

VI

Did the court below commit error in holding that petitioner was not harmed by the illegal actions of the local board when the record showed he was not a religious objector or a draft dodger, was a member of the Naval Reserves and a bona fide full-time college law student entitled to statutory deferment, and the local board illegally denied the statutory deferment, harassed him with illegal classifications followed by orders to report for induction and persisted in a denial of the right to a personal appearance guaranteed by the regulations and the statutory right to a properly qualified local board, all of which rights to procedural due process of law he insisted upon before the board, resulting in continued retaliatory mistreatment?

**Statutes and Regulations Involved**

Involved is the Universal Military Training and Service Act, Sections 4 (a) [50 U. S. C. App. § 454 (a), 66 Stat. 509], 6 (h) [50 U. S. C. App. § 456 (h), 65 Stat. 53] and 10 (b) (3) [50 U. S. C. App. § 460 (b) (3), 65 Stat. 87]. Also involved are Selective

Service Regulations, Sections 1622.15 [32 C. F. R. § 1622.15], 1622.25 [32 C. F. R. § 1622.25] and 1622.50 [32 C. F. R. § 1622.50].

Pertinent portions of the act and regulations appear in Appendix D to this petition.

## Statement of Case

Petitioner—not a conscientious objector but a member of a Naval Reserve component—was ordered to report for induction into the armed forces of the United States on November 23, 1954. (R. 27, 59) He sued out a writ of habeas corpus on November 23, 1954. (R. 1) An order was granted issuing a rule to show cause and directing the production of petitioner. (R. 1) On December 3, 1954, respondent made his return to the writ. (R. 1) On December 3, 1954, there was a hearing on the rule to show cause. (R. 1) At this hearing extensive evidence was received. (R. 2-84) On December 17, 1954, the court entered an order dismissing the petition for writ of habeas corpus. (R. 1, 85) On December 20, 1954, an appeal was taken to the court of appeals. (R. 1) The court of appeals, on May 23, 1955, following oral argument and submission of the case, affirmed the order of the district judge. (See Appendix A.) The petition for rehearing was denied on August 25, 1955. (See Appendix C.)

Petitioner was born August 28, 1927. (R. 4) He registered with Local Board No. 114 of Northampton County, Pennsylvania, September 10, 1948. (R. 4) This board was created and established by the State Director for Pennsylvania as one of four Northamp-

ton County local boards. The other three were Local Boards Numbers 112, 113 and 115, all three being confined to Northampton County with membership limited to residents of that county.

Northampton County Local Board Number 114 was not confined to Northampton County but was given jurisdiction of all of the City of Bethlehem, Pennsylvania. About two-thirds of that city is located in Northampton County. The remaining part of the city is situate in contiguous Lehigh County. Northampton County Local Board Number 114 was therefore created so as to take in parts of the two adjoining counties, Northampton and Lehigh, located within the City of Bethlehem. When Local Board Number 114 of Northampton County was created it was not established as an exceptional statutory Intercounty Local Board provided for in the Universal Military Training and Service Act having jurisdiction over from two to five sparsely-populated counties in lightly populated areas of the United States. Local Board Number 114 was created as an ordinary county local board in a very thickly populated area of Pennsylvania and not in a sparsely populated part of the United States.

The membership of petitioner's local board has never been confined to residents of Northampton County. But at all times material herein the majority of the members of the local board were non-residents of Northampton County, the county where petitioner resides. On September 10, 1948, when petitioner registered, one member of the local board resided in Bucks County, the second member resided in contiguous Lehigh County and the third member resided

in Northampton County. See statement in the draft board file dated May 17, 1954.

Petitioner was mailed a classification questionnaire on June 23, 1949. He filed it on July 6, 1949. (R. 5, 59)[1] He showed he was a member of the Naval Reserve since August 5, 1948, and had prior service in the Naval Reserve from August 13, 1945, to January 31, 1947, when he was honorably discharged. He was a full-time student at Lehigh University, Bethlehem, Pennsylvania. He was neither a minister nor a conscientious objector. (R. 59)

The local board placed him in Class I-D on August 11, 1949. (R. 5) This classification deferred him as a member of the Naval Reserve. (R. 5, 30) Petitioner had previously entered the Maritime Academy of Pennsylvania on August 13, 1945, as a midshipman in Naval Reserve and resigned therefrom in February, 1947, after the state abolished and discontinued the academy. (See papers filed in cover sheet July 8, 1953 and May 17, 1954.) Petitioner was graduated from Lehigh University on June 19, 1950, where he had been in attendance since March 3, 1947. He then registered as a student in the School of Law at Columbia University in September, 1950. (R. 59)

The local board reconsidered his status on February 4, 1952, and placed him in Class I-A, making him liable for training and service. (R. 5, 6, 31) On February 7, 1952, the local board ordered him to take a

[1] These dates are not indicated in the printed record but are shown in the Selective Service System cover sheet of petitioner. Dates and other facts not indicated in the printed record will be found in the cover sheet, Government's Exhibit 4 (R. 59) and reference to them will be indicated herein by showing R. 59.

physical examination. On February 9, 1952, petitioner wrote to the local board and appealed his classification and requested a personal appearance. In the letter he stated: "I am a student in the Columbia University School of Law in New York City and I expect to attain my degree from said institution in June, 1953." (R. 6, 32-33) Two days later he filed with the local board certification from the assistant dean of Columbia University showing he was a full-time law school student at the university. (R. 34) A request of transfer for physical examination to New York was made on February 12, 1952, in accordance with the provisions of the regulations. (R. 59) On February 18, 1952, Columbia University filed with the local board a College Student Certificate (SSS Form No. 109) showing that petitioner was pursuing a full-time course of instruction. On February 20, 1952, Lehigh University also filed such a certificate showing grades and credits on his pre-law college work. (R. 59)

For the first time, on February 27, 1952, the local board classified him as a full-time college student. The II-S classification card mailed to him limited this deferment to four months, or until June 1, 1952. (R. 6, 34, 35, 36) A certificate of acceptability (DD Form No. 62) was mailed to him on May 1, 1952, showing that he had been accepted on his physical examination on April 23, 1952. (R. 59)

Petitioner wrote to the local board on May 14, 1952, stating: "I plan to continue my law school studies at Columbia University School of Law, New York City, N. Y. during the 1952-1953 Law School Term and expect to be graduated therefrom in June 1953 with an LL.B. degree." He requested a continuance

of his student deferment. (R. 59) On July 14, 1952, there was filed with the local board a College Student Certificate (SSS Form No. 109) by Columbia University, giving his scholastic rating based on examination and stating that he had been accepted for admission to the third year class. (R. 59) On August 7, 1952, the local board mailed notice to petitioner and to Columbia University that he had been placed in Class II-S, until June, 1953. (R. 7, 37, 59)

Petitioner enjoyed the benefits of this college student deferment until May 28, 1953, when he was classified I-A by the local board. (R. 7, 37) On June 1, 1953, after he received his notice of classification he wrote to the board acknowledging receipt of it. He stated that he had not yet been graduated from law school, that it would take until October, 1953, before he could get his degree, and "I am not eligible to take the Examination for Admission to the Bar of Pennsylvania without such degree." He then asked the board: "Under the circumstances kindly advise me if I am required to take an appeal from your present classification until such time as you hear from Columbia Law School, or what other procedure I should follow to preserve my student classification until I receive my law degree in October, 1953." (R. 37, 38, 40, 52)

On June 5, 1953, in a letter to Columbia Law School, the local board stated that the State Director had advised the board to request from Columbia Law School to "submit to us the grade of this registrant for his third year of law school and also a statement as to why the registrant did not receive his degree." (R. 59)

On June 16, 1953, the clerk of the local board called "Mr. Price" who advised the clerk he would take the case of petitioner up with "Headquarters" on June 17. On June 17, 1953, the clerk made a memorandum that "Mr. Price advised mail notice of induction." (R. 59) The local board thereupon ordered petitioner to report for induction on July 9, 1953. (R. 39) On June 18, 1953, the petitioner's father, the government appeal agent for the board, wrote to the chairman of the local board that the board's clerk had called him about his son's status. He added: "Before he will be eligible for his Degree from Columbia University, it will be necessary for him to submit an article on the subject which has been assigned to him by the authorities at the law school as well as to obtain certain credits in connection with his course." He informed the chairman of the board that petitioner was going to the University of Wisconsin to attend summer school to get the credits needed for graduation at Columbia in the fall. Petitioner's father asked that induction be postponed to permit this. (R. 59)

On June 19, 1953, the local board received from the Columbia University a certificate of grades and student's rating for the third year. The registrar added that the question about why he had not been graduated in June was being referred to the Dean because petitioner's case was a special case. (R. 59)

On June 22, 1953, petitioner wrote to the local board and requested a postponement of his induction fixed by the order to report until after his graduation in October. He informed the board he was enrolled in the summer school at the University of Wisconsin

and had to get seven additional points before graduation and write an essay before he could get his degree. (R. 44, 59) The State Director, on June 25, 1953, ordered the local board to give a 60 day postponement to petitioner "so that he can complete his studies at law school." (R. 59)

On June 24, 1953, the membership of the local board changed from one resident of Bucks County, one of Lehigh County and one of Northampton County, to two residents from Lehigh County and one from Northampton County. The majority of the members continued to be non-residents of Northampton County, the county that petitioner resided in. (See paper in the draft board file dated May 17, 1954, R. 59)

On June 26, 1953, the University of Wisconsin certified to the local board that petitioner was registered with the summer school. On June 29, 1953, it further certified that petitioner was enrolled as a student in good standing and that when he completed his course he would be eligible for graduation and a degree from Columbia University. (R. 59)

On June 29, 1953, the local board postponed induction, reopened petitioner's case, classified him *de novo* and mailed to him notice of the new I-A classification the next day. (R. 59)

On June 30, 1953, the Dean of Columbia Law School informed the local board that all the Spring Grades had not been completely recorded but that petitioner had an average of B for the third year law school course. On July 2, 1953, the local board received from the University of Wisconsin a certificate showing that petitioner was satisfactorily pursuing a full-time course of summer instruction. (R. 42, 59)

On July 6, 1953, within ten days of the June 29 I-A classification, petitioner requested a personal appearance to substantiate his right to the college student classification. He stated that if, following a personal appearance, the board denied that classification, he desired his case forwarded to the appeal board. He clearly stated that he appealed from any ruling of the board that denied him his rights as a student. (R. 39, 40-41, 42) In the letter to the local board petitioner said:

". . . I hereby respectfully request you to re-open my case and afford me the opportunity of appearing in person before the Board to substantiate the following facts: . . .

"My final examination of the 1952-53 session at Columbia Law School took place on May 25, 1953. I returned to my home at 414 High Street during the evening of May 30, 1953. On June 1, 1953 I received your form SSS No. 110, postmarked Bethlehem, Pa., May 29, 12:30 P. M. 1953, that your Board had classified me in Class I-A on May 28, 1953. I then requested the Government Appeal Agent of your Board to advise me what I had to do to preserve my Class II-S status until the local board heard from Columbia Law School as required by the Universal Military Training Act and the State Directive. As directed by your Government Appeal Agent, I wrote your Board on June 1, 1953, requesting you to 'advise me if I am required to taken an appeal from your present classification until such time as you may hear from Columbia Law School on what procedure I should follow to preserve my student classification until I receive my law degree in October 1953.'

"Your Board never replied to my letter in any respect but deliberately waited until the time to appeal had expired and then sent me a letter dated July 17, 1953 directing me to report at 'the Salvation Army Citadel on July 9, 1953 at 6:30 A. M. for induction.' On May 28, 1953,[2] and June 1, 1953 I was, and still am, a graduate student in good standing and a candidate for a graduate degree from Columbia Law School in October 1953, and by virtue of the Universal Military Training Act of June 19, 1951 entitled by law to deferment and to be classified as Class II-S until October, 1953.

"I, therefore, respectfully request your Honorable Board to re-open my case in order to afford me the opportunity to appear in person to substantiate my position as above outlined and that after due consideration of my case your Honorable Board restore me to my former and appropriate classification, namely Class II-S until I graduate from Columbia Law School in October 1953, or I cease to satisfactorily pursue my course of study at said Institution; or be classified in Class I-S pending the receipt of my graduate degree in October 1953. If denied these rights I respectfully request that you forward this request to the proper Appeal Board as I hereby notify you that I am appealing from any action on the part of your Honorable Board which denies me the rights herein set forth." (R. 59)

On July 7, 1953, the assistant to the registrar at Columbia University filed College Student Certificate (SSS Form No. 109) with the local board showing

[2] This letter was erroneously predated July 17 instead of June 17, the correct date.

the rating of petitioner in this third year of law school and stated that he would be accepted when he presented himself on September 24, 1953, at Columbia Law School. (R. 59)

On August 10, 1953, the clerk of the local board wrote to the petitioner as follows:

"In reply to your letter received July 8, 1953, regarding your classification by this board, may we advise that you are not eligible to carry a II-S or a I-S classification inasmuch as your term of study should have ended in June, 1953 at which time you should have received your law degree.

"Upon hearing from you and the authorities at Columbia University that you needed the credits of a summer session to enable you to receive your degree, we contacted our State Headquarters and they, after a review of the photostatic copy of your school record, informed us that they would authorize a postponement of your induction to complete this summer session if the board voted to request the authority. The board agreed that this action be taken and postponed your induction accordingly.

"This postponement has been granted until the end of your summer session. If you need further schooling beyond this date to secure your diploma, please advise us a few days in advance in order that we may obtain the necessary authority for a further postponement to allow you to receive your degree." (R. 59)

On August 18, 1953, petitioner wrote two letters appealing from the action of the local board in his case, complaining of the denial of his rights to a

personal appearance so as to preserve his rights under the regulations, and "without prejudice to my rights in my appeals I respectfully request you to grant me the authorized extension of sixty days" in order to receive the degree from Columbia University. (R. 10, 12, 43, 59)

The State Director called petitioner's file in for review on August 21, 1953. After reviewing the file, sent to him by the local board, the State Director, on August 28, 1953, notified the local board that he interpreted and construed petitioner's letter of June 1, 1953, as an appeal. The State Director overlooked both the later reclassification of June 29, 1953, which reopened the entire case and set aside the May 28 classification, and petitioner's timely request of July 6, 1953, for a personal appearance and appeal from the June 29 classification. The State Director illegally instructed the local board to send "the cover sheet to the appeal board having jurisdiction over your local board area. We also suggest that his postponement of induction be extended indefinitely to permit consideration by the appeal board." (R. 46, 47, 59).

On August 28, 1953, the day that the State Director wrote to the local board, petitioner reached his twenty-sixth birthday. This put him into the category of over-age registrants under the act. At this time he was in Class I-A and not in a deferred classification as a college student. (R. 8, 12, 43) On August 31, 1953, instead of honoring petitioner's request for a personal appearance made on July 6, 1953, the local board overlooked its reopening of June 29, 1953, and ordered his earlier letter of June 1, 1953, asking for advice, filed as an appeal. The entry in the minutes

for August 31, 1953, read: "Appeal Filed (Letter from State Hdqs.)" (R. 59)

On September 1, 1953, the local board, still ignoring the request for personal appearance, forwarded the file to the appeal board and mailed to the petitioner a Postponement of Induction showing his induction had been postponed "indefinitely." (R. 59)

On September 5, 1953, petitioner called the board's attention to its mistake and stated: "Am I correct in assuming that your order of 1 September 1953 applies only to your order of 17 June 1953 and does not dispose of the questions raised in my appeals dated June 1, 1953, July 7, 1953,[3] and August 18, 1953, respectively, nor of the appeals in each instance." (R. 59) This notice and question was answered by the local board by a letter dated September 9, 1953, containing a mere statement that petitioner's file was with the appeal board and erroneously added "in accordance with your request." (R. 14, 59)

Petitioner then on September 16, 1953, wrote the local board, in part, as follows: "I did not request you at any time to send my folder to the Appeal Board. I have been endeavoring for more than two months to have you re-open my case and afford me the right of appearing in person before your Board, a substantial right given to every registrant by the Selective Service Regulations, for the purpose of presenting to you in person such facts and evidence as I deemed necessary to substantiate my position in connection with your re-classification in my case from II-S to I-A." (R. 14, 59)

---

[3] This should have been July 6, 1953.

The appeal board, without regard to the multitudinous irregularities committed by the local board, summarily classified petitioner in I-A on November 20, 1953. (R. 14, 59)

On November 30, 1953, petitioner wrote to the State Director complaining about the violation of his procedural rights. He said, among other things: "My appeal is based on the fact that I have, at all times, been deprived of the substantial right to appear in person before the Local Board in response to my written requests of February 9, 1952, July 7th[4] and August 18th, 1953, which requests were repeated and referred to in my letter to Local Board dated September 16, 1953. . . .

"I have never been legally classified by the Local Board as Local Board No. 114, prior to June 26, 1953, was never legally constituted in accordance with the provisions of the Selective Service Act.

"I have never been afforded the opportunity of appearing in person before any Selective Service Board or Appeal Board for the purpose of personally presenting and discussing my case with the members of the Board or a member designated by the Board." (R. 14, 46, 47, 59)

The State Director, on December 2, 1953, directed the local board to send the cover sheet to State Headquarters for review. On December 7, 1953, the State Director reviewed the case and stated, in the face of flood of violations of procedural rights, that no further action would be taken, and he terminated the postponement of induction. Ignoring the timely request

[4] This should have been July 6, 1953.

of July 6, 1953, he also stated, erroneously, that petitioner did not request a personal appearance in time. The State Director then notified the local board on the same date erroneously that there was no further reason to postpone the induction and thereby gave the local board the green light to proceed with induction. He stated, however, that the June 1, 1953, letter would be liberally construed as a letter requesting an appeal. In this he overlooked the later reopening, reclassification and timely request for personal appearance. He denied the request for action based on the denial of personal appearance. See his letters to the board and to the petitioner on December 7, 1953. (R. 59)

After his graduation from Columbia Law School in October, 1953, the petitioner applied for permission to take the Pennsylvania State Bar Examination. When he was approved for the examination, the Secretary of the State Board of Law Examiners for Pennsylvania wrote to the local board on December 16, 1953, as follows:

"A few days ago Justin Kevin McCarthy, of 414 High Street, Bethlehem, informed me of the possibility of his receiving an induction notice prior to his appearing for his first bar examination before this Board which will be held on January 28 and 29, 1954.

"Mr. McCarthy is a graduate of Columbia Law School and is eligible to sit for our winter examination. A successful bar examination is a condition precedent to his admission to the bar of the Supreme Court of Pennsylvania, and if he is precluded from appearing for the bar examination on January 28 and 29 next by reason of induction into the armed

forces prior to that time, his appearance will have to be postponed until after his return to civilian status several years after his graduation from law school. It is therefore exceedingly urgent as well as desirable that induction in his case be postponed until January 30 or thereafter.

"The additional time will alleviate the extreme hardship that will result if this candidate were required to report for an early induction and then be expected to take the bar examination after his return to civilian status." (R. 59)

When the local board received this letter it sent the file again to the State Director for review on December 17, 1953. On reviewing the file, the State Director then and for the first time discovered that petitioner had been denied his right to a personal appearance. He wrote to the local board on December 29, 1953, as follows:

"In order to avoid any possible miscarriage of justice, this headquarters now rescinds its instructions to the local board in its letter of 7 December 1953, and requests that the registrant be allowed to meet and discuss verbally anything he desires with the board. Also, under the provisions of Local Board Memorandum No. 44, issued January 31, 1952, this headquarters extends the postponement of this registrant's induction until after the date of the Pennsylvania State Bar Examinations next following his graduation which, we understand, will be scheduled in February of 1954." (R. 59)

On January 7, 1954, the local board wrote to petitioner notifying him to appear before it on January

12, 1954. (R. 15, 48) Petitioner wrote the local board on January 9, 1954, propounding certain questions. (R. 15, 49-50) The local board replied on January 11, 1954, and stated that petitioner should appear before it and "be given an opportunity to discuss your case in full with the local board." (R. 16, 51) On January 12, 1954, petitioner telegraphed the board from Philadelphia about four hours before the time for the appearance that he was engaged in taking the bar examination and claimed the benefits of the Act of Congress and asked that he be excused from appearing on January 12. (R. 16, 17, 59)

On January 12, 1954, the local board, notwithstanding the notice and the law, illegally ruled that petitioner had waived his right to the personal appearance by failure to appear, but the board postponed induction until February 1, 1954. (R. 59) Petitioner complained to the State Director and on January 13, 1954, the local board informed petitioner that his file had again been called in by the State Director. (R. 59)

On January 19, 1954, petitioner wrote to the local board and challenged the jurisdiction of the local board. His letter was filed on January 22, 1954. He contended that the members of the local board were disqualified because of their non-residence. He asked that the local board exercise no further jurisdiction in his case. (R. 17, 18, 59)

On January 22, 1954, the local board informed petitioner that his file was in the custody of the State Director. (R. 8, 18, 59) On January 28, 1954, the State Director informed petitioner that the local board membership and procedure were legal. (R. 59) On January 28, 1954, the government appeal agent, father

of petitioner, wrote to the local board and requested that he be given the right to attend meetings. (R. 59) The local board informed him on February 4, 1954, that it did not need his presence or help in consideration of petitioner's case. (R. 59)

On February 4 and February 7, 1954, petitioner wrote to the State Director and protested the denial of petitioner's right to a personal appearance. (R. 18-19, 59) The State Director, on February 9, 1954, acknowledged receipt of petitioner's letters, but thereafter took no action. (R. 51)

General Lewis B. Hershey, the Director of Selective Service, reviewed petitioner's file and discovered the violation overlooked by the State Director for Pennsylvania. In a letter to the State Director dated April 14, 1954, he stated that petitioner was "entitled to a personal appearance under the provision of Part 1624 of the Regulations. This right arose as the result of the registrant's letter of July 6, 1953." (R. 59) General Hershey further stated that the action of the local board on June 29, 1953, in reopening the classification constituted a cancellation of the then outstanding order to report for induction and made null and void all orders for induction as well as all postponements. General Hershey said: "Consequently at the present time there is no outstanding valid order to report for Induction." (R. 59) The State Director then, on April 23, 1954, wrote to the local board that petitioner should be notified that his letter of July 6, 1953, requesting a personal appearance, would be granted. The State Director said that it "has been determined to be a request for a personal appearance." The local board received this letter on April

29, 1954, along with the cover sheet of petitioner. (R. 59)

On May 3, 1954, the State Director wrote petitioner that the order for induction was invalid. He said: "Regarding procedures undertaken in connection with your classification, it is established that your letter of July 6, 1953, resulted in your right to a personal appearance under the provisions of Part 1624 of the regulations. Under all circumstances of your case, we are suggesting to the local board that it notify you by letter of a suitable date for you to appear before it and that this appearance at that time will constitute a personal appearance within the provisions of Part 1624 of the regulations." (R. 19, 20, 59)

On May 7, 1954, the local board, almost one year after it had been requested, notified petitioner that his request for a personal appearance had been granted and he should appear for a hearing on May 17, 1954. (R. 20, 59)

On May 11, 1954, petitioner wrote to the State Director and protested that the local board was illegally constituted and therefore lacked jurisdiction. (R. 59)

On May 17, 1954, a preclassification hearing in disregard of petitioner's July 6, 1953, request for a personal appearance was held by the local board. Petitioner personally appeared and presented his written statement challenging all procedure of the board from the time of the first classification to the date of the personal appearance because of the illegal formation and membership of the board. He pointed out that the local board, although not an intercounty board, included parts of two counties and that the member-

ship of the board was illegal. He stated, among other things:

"The City of Bethlehem was incorporated as a City of the Third Class of the State of Pennsylvania on July 17, 1917 by virtue of an Act of Assembly of said State. Its territorial limits lie partly in Lehigh County and partly in Northampton. It is composed of seventeen Wards—Ward 10, -11, -12 and 13 being in Lehigh County and Wards 1, 2, 3, 4, 5, 6, 7, 8 and 9 inclusive, as well as Wards 14, 15, 16 and 17 being wholly in Northampton County. Between one-fourth and one-third of its estimated population of 67,000 inhabitants live in Lehigh County while the remainder thereof reside in Northampton. All its municipal matters are subject to the Courts of Northampton County.

"By virtue of the authority vested in him by the Acts of Congress and the Selective Service System Regulations, the State Director of Selective Service for the State of Pennsylvania created three local board areas in the County of Lehigh and four local board areas in the County of Northampton—numbering the Lehigh County local board areas numerically as follows: 'Local Board No. 89, Allentown; Local Board No. 90, Allentown, and Local Board No. 91, Allentown.

"The four local board areas in Northampton County were designated numerically by said State Director as follows, to wit: Local Board No. 112, Easton; Local Board No. 113, Bethlehem; Local Board No. 114, Bethlehem, and Local Board No. 115, Easton.

"At no time during the period of time pertinent to the instant matter did the State Director, the Na-

tional Director or the President of the United States designate the Counties of Lehigh and Northampton as an 'Intercounty Local Board Area'.

"Each member of any local board must be (a) a male citizen of the United States; (b) a resident of the county, and if possible, a resident of the area in which the local board has jurisdiction; and (c) a civilian without affiliation with the armed forces or a reserve component thereof. Section 1604.51 (c).

"Local Board No. 114, Northampton County, from the time of its creation to and including June 26, 1953, was composed of the following members, to wit:

"Mr. Frank A. Bilheimer, a resident of Bethlehem, Lehigh County, and a non-resident of Northampton County, appointed and acting as a member thereof in violation of the Law and the Regulations;

"Mr. Irving C. Hanners, a resident of Springfield Township, Bucks County, Pa. and a non-resident of Northampton County, appointed and acting as a member thereof in violation of the Law and the Regulations;

"Mr. Edward H. Thevenet, a resident of Bethlehem, Northampton County,—the only member of said Board duly and properly appointed as a member thereof in compliance with the Acts of Congress and the Selective Service Regulations.

"On or about June 26, 1953, Mr. Irving C. Hanners, a member of said Board No. 114, Northampton County,—a resident of Springfield Township, Bucks County, Pa., resigned.

"On or about June 28, 1953, the President appointed Mr. Frank A. Collie, a resident of Bethlehem, Lehigh County, Pennsylvania, to Board No. 114, Northampton County, to succeed the said Mr. Irving C. Hanners, resigned, in violation of the Law and the Regulations.

"Since on or about June 28, 1953, Board No. 114, Northampton County, has been composed of the following members residing in the County following their respective names:

"Mr. Frank A. Bilheimer, residing in Bethlehem, Lehigh County; Mr. Frank A. Collie, residing in Bethlehem, Lehigh County; and Mr. Edward H. Thevenet, residing in Bethlehem, Northampton County; the said Mr. Frank A. Bilheimer and Mr. Frank A. Collie not having the required residential qualifications, are disqualified for appointment to said board and cannot legally act as members thereof." (R. 24, 25, 59)

The local board, almost one year after he requested the personal appearance, reclassified petitioner I-A on May 17, 1954. (R. 25, 54, 59) He was notified of this on May 18, 1954. (R. 25, 54) Petitioner wrote to the local board on May 26, 1954, reviewing his hearing and stating in detail what had taken place. (R. 59) On May 27, 1954, petitioner appealed his case. (R. 59) On June 1, 1954, the local board made a memorandum refusing to correct the minutes as suggested by petitioner. On June 2, 1954, the local board sent petitioner's file to the appeal board for review. (R. 59) On June 7, 1954, the file was returned by the appeal board at the request of State Headquarters, as per notation on the back of the question-

naire, so that the registrant could place additional information in the file. According to memorandum dated July 1, 1954, in the file, he was given until July 1 to submit such information. The file was again sent to the appeal board on July 1, 1954. (R. 59)

The appeal board denied the over-age (V-A) classification claimed by petitioner and, on October 14, 1954, placed him in Class I-A, making him liable for training and service. (R. 26, 56, 59) Notice of this classification was mailed to petitioner on October 22, 1954. (R. 59) On October 25, 1954, petitioner was mailed an order to report for induction on November 23, 1954. (R. 27, 59) Petitioner, through his father, the Government Appeal Agent, on October 29, 1954, requested the appeal board to reconsider its classification. The State Director of Selective Service was also requested to take an appeal to the President. (R. 27, 59)

On October 29, 1954, the local board forwarded the file to the State Director and the file was returned by the State Director on November 2, 1954, for certain actions to be taken. The file was again sent to the State Director on November 3, 1954. (R. 59) On November 17, 1954, the State Director returned the file to the chairman of the local board, stated that he would not appeal to the President, and that the order of induction for November 23, 1954, would stand. (R. 28, 59)

Every procedural act of the local board taken and classification made by it in the processing of petitioner, from the date of registration to the date of the final order to report for induction, was taken when the board illegally included a part of contiguous

Lehigh County. No act was done at any time when the area of the local board was confined to Northampton County. The local board has never been limited to Northampton County at any time material herein. The majority of the members on the local board who (1) classified petitioner, (2) issued him the various orders and (3) took action at all times in petitioner's case, were not residents of Northampton County. From September 10, 1948, to June 19, 1953, one member was from Bucks County, another from Lehigh County and a third from Northampton County. From June 19, 1953, to November 23, 1954, the date petitioner submitted to induction, the majority of the membership was still composed of non-residents of Northampton County. Two members were from contiguous Lehigh County and only one member was from Northampton County where petitioner resided.

## Reasons for Granting Writ

### Preliminary Summary

Whether the Congress intended to prohibit county boards from being formed with intercounty jurisdiction and to forbid non-resident membership on local county boards is an important question which has not been decided by the Court but which should be so as to require the Court to take jurisdiction in this case. See the discussion, *infra,* at pages 29 to 36, this petition under point I.

The court below rendered a decision in direct conflict with other circuits in holding that the de novo classification by the appeal board cured the denial of procedural due process by the actions taken by

the illegally constituted board and which conflict is sufficient basis for granting the writ in this case. See the discussion, *infra,* at pages 36 to 39, under point II, of this petition.

Whether the Congress intended to extend liability of registrants beyond their twenty-sixth birthday until they reach thirty-five years of age because they have been deferred at any time prior to their twenty-sixth birthday is an important question of federal law which has not been but which should be decided by this Court. The substance and importance of the question is shown, *infra,* at pages 40 to 49, under point III of this petition.

The court below, in failing to hold that the local board denied petitioner the over-age classification without basis in fact, made a decision out of harmony with a decision of this Court and which is sufficient basis for granting the writ in this case. See the discussion, *infra,* at pages 50 to 52, this petition under point IV.

Whether the petitioner was illegally denied procedural due process of law when he was refused a personal appearance during the time he sought a student's classification and because of the later and continued repeated denials is an important question that has not been but which ought to be decided by this Court and one upon which the court below rendered a decision in conflict with the holding of another circuit. See the discussion, *infra,* at pages 52 to 63, this petition, under point V.

## I

The court below decided an important question of federal law which has not been and which ought to be decided by this Court. The court below properly held that the board was not an intercounty board under the act. But the court below erred in failing to hold that the local board lacked jurisdiction to order petitioner to do service because (1) the area of the local county board was not confined to Northampton County where the local board office was situated and (2) the membership of the local county board was not properly limited to Northampton County, but the majority of the members were non-residents of Northampton County.

Petitioner was at all times a resident of Northampton County. The local board was located in Northampton County. Although it is referred to as Northampton County Local Board Number 114, it illegally encompasses a part of contiguous Lehigh County. Under the act petitioner was entitled to be classified by local board members coming exclusively from Northampton County, the county in which he resided. But he was finally classified by local board members the majority of whom were from Lehigh County and was several times classified by a member who lived in Bucks County, during which time the majority of the members were non-residents of Northampton County. He also was entitled to be classified by a local board that was a local county board for Northampton County and not a hybrid board including parts of Northampton and Lehigh Counties, with a majority of board members non-residents of the county.

Section 10 (b) (3) of the act (50 U. S. C. App. § 460 (b) (3)) provides that the President "shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State." The section then provides for intercounty boards in sparsely settled states. The act does not provide for intercounty boards made up of parts of two or more counties. It is plain from a reading of the act that the geographical area of a local county board—not intercounty under the act—must be confined to and be only "in each county or political subdivision corresponding thereto."

The court below said that what is meant by Congress "is not entirely clear." (See Appendix A.) It is certain that Congress did not intend to be ambiguous about the term. By the term "political subdivision corresponding thereto" Congress meant subdivisions of states that use the word "parish", such as Louisiana, to describe divisions of the state, rather than the word "county". The words "corresponding thereto" mean "similar thereto". *Lockheed Aircraft Corporation* v. *Rathmon,* S. D. Cal., 106 F. Supp. 810. "Corresponding" means identical. (14A Corpus Juris 1428.) Congress surely did not intend to authorize a local board made up of parts of two contiguous counties because such an area is not a "political subdivision" of a state "corresponding to a county". To hold otherwise, as the court below in effect did, would be unreasonable.

It was egregious error for the court below to hold that "political subdivision corresponding thereto" means parts of two counties. Congress said no such thing. A political subdivision of a state correspond-

ing to a county can never be in two counties. Congress used "political subdivision" as equal to "county", not "city." It left no room for new invention as in the case of this local board located in the City of Bethlehem. There is no political subdivision equal to a county in Pennsylvania that corresponds to the area of this local board. Congress did not intend to make new political subdivisions for the state. It left them as it found them.

It cannot be said that Congress authorized the creation of a board which would include that part of the City of Bethlehem lying in two different counties. This small part of the County of Northampton in the City of Bethlehem is not a political subdivision corresponding to a county of Pennsylvania. Congress did not have in mind making special provisions for special boards in unusual cities like Bethlehem and New York City, where more than one county is within the city. Congress intended that the boundaries of the local boards be county lines, not city limits. The administrative interpretation of the act in New York City supports petitioner here.

This Court can take judicial notice that in New York City all boards are kept within the respective boundaries of the counties of New York, Kings, Queens, Bronx and Richmond. (See the order of the President and records of the Selective Service System.) No board within New York City has its boundary beyond the county line where it is located. In New York City the board members are confined to the county where the board is located.

That is what should have been done in Northampton and Lehigh Counties at Bethlehem when this board

was created and the members appointed. It should have been confined to Northampton County and not made a conglomeration to include parts of both. The members of the board should have been from Northampton County where the board is located. The board in question is an illegitimate hybrid not fathered by the law but engendered by the thoughtlessness of the administrators of the law. It cannot be legitimatized by the court below.

Since the court below properly held that the board "cannot be construed as an intercounty local board," the law requires that it be a county board either for Lehigh or for Northampton County. The board was named by the Director of Selective Service as a Northampton County board. As far as petitioner is concerned he was entitled to be registered with a Northampton County board composed of members who were all residents of Northampton County and none from any other county. But the local board was composed of residents of Lehigh County at all times and, until petitioner's last classification by the local board, a resident of Bucks County, not residing within the jurisdiction of the local board. This composition with the majority of the members being non-residents of Northampton County made the local board an illegal board because it was not set up as an intercounty board under the act and regulations.

Section 10 (b) (3) of the act provides that each member of the local board shall be a civilian residing in the county where the local county board is situated. That same statute also requires that the area of each local county board shall be confined to a county or an equivalent political subdivision of the state, such

as a parish. The area of this local board and the membership thereof in this case do not fit the language of the statute. The statute requires a separate local board for Lehigh County. A part of it could not be swept into the local board for Northampton County Number 114. The statute did not authorize the creation of a Northampton County local board to include Lehigh County composed of residents of the two counties. The court below erroneously interpreted the statute so as to approve the illegal acts of the State Director of Selective Service for Pennsylvania and the Director of Selective Service creating the board composed of segments of the two counties and designated as Northampton County Local Board No. 114.

The Act of Congress limited the jurisdiction and membership of local boards to the county of residence of the registrants. This was for the purpose of insuring as near as possible the intimate knowledge of board members with local conditions and to grant the registrants the benefit of the judgment of local men familiar with the registrants and their community of residence. Making mandatory this residence requirement for local board members was to insure the local single county nature of the county boards, and Congress thereby laid down a minimum statutory formula. This minimum was designed to protect the rights of the individual registrant. Congress knew that if this was not done each registrant would not be judged by his neighbors. Congress knew that the local board would not have the benefit of men who are really in a position to know the whereabouts of registrants, the activity of local registrants and their sincerity unless the board was local within the county.

This minimum formula contemplated members on the board residing in the county where the board is located who would be familiar with the background of registrants. In the case at issue the statutory formula intended by Congress was clearly ignored and defied.

At all times from the first to the last classification of petitioner by the local board the membership of the board was intercounty and the majority of the members were non-residents of Northampton County. The members of the board were chosen from Bucks, Lehigh, and Northampton counties. The final selection of two of the three members from Lehigh County and one from Northampton County was because the local board was illegally formed so as to take in a geographical area including contiguous parts of two adjoining counties.

This means its boundaries were restricted by Congress to the boundaries of that county. Since it could not extend beyond the limits of Northampton County, the statute required that "each member . . . shall be a civilian . . . residing in the county" of Northampton.—50 U. S. C. App. § 460 (b) (3).

This construction is supported by the regulations promulgated by the President, providing that members of the local board shall "be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction."—32 C. F. R. § 1604.52 (c).

This section means that the residents shall come from the county and if possible from the immediate areas of the board within the county. It permits

members to reside outside the area of the board but prohibits their residing outside the county as here. The only section of the regulations that provides for members outside the county where the board is located is 32 C. F. R. § 1604.52 (b) which governs intercounty boards. The proviso of the act and this regulation exclude the rationalization of the court below that Congress intended to have members from outside the county on an ordinary local county board.

This is an important question of federal law that ought to be determined by this Court. There may be other local boards in thickly populated areas of the United States that are constituted similarly to the board here. These boards have jurisdiction over several thousands or registrants, which adds to the importance of this question. Such boards are not intercounty boards permitted by the statute. They are hybrid boards taking in parts of two counties. They have illegal membership on them from more than one county. These boards are a violation of the rights of these many thousands of registrants in various parts of the country. The statutory mandate has been defied by the Selective Service System in the creation of such boards. It is of utmost public importance that the Selective Service System comply with the law in creating local board and appointing residents of the county as members.

Even if there is only one local board in the country of this type affecting a few thousand registrants, the question is of public importance because it is a departure from the law that ought to be condemned and stopped. If it is not stopped now by this Court the Director of Selective Service and the various state directors will take the opinion of the court below as

authority to multiply and increase these hybrid boards with non-resident members. Then the rights of additional thousands if not hundreds of thousands of registrants will be violated.

The defiance of the act and regulations is of utmost public importance. If the national and state directors can disregard the intent of Congress, as was done in this case, then there is grave danger that the practice will continue to increase in other thickly populated areas of contiguous counties until several hundred thousand registrants will be involved. Even if the irregularity may not now affect great numbers of people, this Court need not refrain from taking cognizance of an illegal administrative interpretation until its consequences assume Gargantuan proportions so as to affect larger numbers to become important. The very fact that Congress has been defied with the approval of the court below is sufficient to make the question important. It is of great public importance that all beginnings of usurpation of power and flouting of Congress be extirpated in their inception.

Because of the public importance of this question alone the petition for writ of certiorari ought to be granted.

## II

The holding of the court below, that the denial of petitioner's rights to procedural due process of law, by subjecting him to an illegally constituted local board with membership in violation of the statute, was cured by the *de novo* classification, is in direct conflict with the holdings of other courts of appeals on the same question.

In the last paragraph of its opinion (Appendix A, *infra,* page 80), the court below does not limit the rule to an erroneous classification. In that part of the opinion it deals with a procedural problem. If the holding had been confined to the error of the local board in giving the final classification erroneously, then there would be no conflict. A *de novo* appeal board classification does cure an illegal local board classification. It does not, however, cure a denial of procedural due process by a local board. The opinion of the court below in the last paragraph is not limited to cases of erroneous classification. The rule of curing local board error in classification is there illegally extended to a denial of procedural due process of law by the local board. The only way to cure a denial of due process by the local board is for it to purge itself of the denial by starting all over again and go through the proper procedure without repeating the denial. This should be ordered here.

Action by an illegally constituted board or one with illegal membership, a majority of the members being non-residents of the county, is a violation of procedural due process of law. It is not an error in classification. It is a procedural blunder. If a wrong board classified and ordered a registrant to report for induction, that concededly would be a violation of procedural due process. If a "Pennsylvania board ordered a citizen and resident of Oregon to report for induction" that would be "beyond its jurisdiction" and a violation of procedural due process of law. (*Estep* v. *United States,* 327 U. S. 114, 126 (1946)) When the court below approved the order made by a majority of local board members who were non-residents it in effect approved a principle which

permits out-of-county or out-of-state boards to order non-residents to report for induction, a thing condemned by this Court.

There must be local board action in the case to start with before the appeal board has jurisdiction. If there is no local board action, there is no procedural due process and the appeal board classification does not give jurisdiction for the order. If a local board had never acted in a case and the appeal board was the first to classify, such non-action by the local board, being a denial of procedural rights, could not be cured by appeal board action. Additionally if the local board was illegally constituted or had non-resident members, its action likewise would be a violation of procedural due process because it is not a proper tribunal or is no tribunal under the law. The reclassification by the appeal board did not give jurisdiction to the illegal local board and did not provide procedural due process that was missing *ab initio*. Such lack of procedural due process was not cured by a reclassification by the appeal board.

There are numerous cases where the courts have held an arbitrary and capricious local board classification (as distinguished from a denial of due process procedurally) was cured by the appeal board classification. (*Cramer* v. *France,* 9th Cir., 1945, 148 F. 2d 801; *Tyrrell* v. *United States,* 9th Cir., 1952, 200 F. 2d 8) But even the court first to announce the *Cramer* rule has said that a *de novo* classification by the appeal board does not cure denial of procedural due process by the local board.—*Franks* v. *United States,* 9th Cir., 1954, 216 F. 2d 266, 270, citing *Knox* v. *United States,* 9th Cir., 1952, 200 F. 2d 398; *United*

*States* v. *Peebles,* 7th Cir., 1955, 220 F. 2d 114, 119-120; *Mintz* v. *Howlett,* 2d Cir., 1953, 207 F. 2d 758; *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90.

The court below said in *United States* v. *Zieber,* 1947, 161 F. 2d 90, that "a failure by the Local Board to perform the duties imposed upon it by the Selective Training and Service Act and the regulations could not have been cured by the *de novo* consideration of Zieber's classification by the Appeal Board."

The holding of the court below that petitioner's reclassification by the appeal board cured the denial of procedural due process of law by an illegally constituted local board with disqualified non-resident members is in direct conflict with *United States* v. *Peebles,* 7th Cir., 1955, 220 F. 2d 114, 119-120; *Franks* v. *United States,* 9th Cir., 1954, 216 F. 2d 666; *Mintz* v. *Howlett,* 2d Cir., 1953, 207 F. 2d 758; *Knox* v. *United States,* 9th Cir., 1952, 200 F. 2d 398.

It is submitted that there is a sufficient conflict between the holding in this case and the holdings in the cases by other courts of appeals cited above so as to require the granting of the petition for writ of certiorari. In event the Court fails to find such a conflict, then it is suggested that the question of federal law involved, whether a *de novo* classification by an appeal board cured a denial of procedural due process by a local board, is of such great public importance that this Court ought to determine it by granting the petition for writ of certiorari.

## III

The court below decided an important question of federal law which has not been but which ought to be decided by this Court. The Court below held that the liability of petitioner had been extended until he was thirty-five years of age because he escaped induction before he was twenty-six years of age.

The statute makes extension of liability contingent upon whether the registrant is in a deferred classification on his twenty-sixth birthday and it is immaterial that petitioner was not inducted before his twenty-sixth birthday. The holding of the court below that petitioner was for all practical purposes deferred within the meaning of the act so as to extend liability through postponement of induction constitutes an interpretation of the statute that is in conflict with the congressional intent. A postponement of induction has never been and cannot be held equivalent to a deferment. This is an important question that ought to be determined by this Court.

Section 4 (a) of the act (50 U. S. C. § 454 (a)) provides that the limit of liability for training and service in the armed forces is from the age of 18 to the age of 26, inclusive. That section also provides that no person shall be inducted "after he has attained the twenty-sixth anniversary of the day of his birth."

Section 6 (h) of the act (50 U. S. C. § 456 (h)) provides that "persons who are or may be deferred under the provisions of this section shall remain liable for training and service" until their thirty-fifth birthday.

The time of the deferment is important according to Congress. The deferment classification by the board must be in effect at the time the registrant reaches his twenty-sixth birthday. If he is not deferred on that date his liability is not extended. Congress said so in House Report No. 271 (82d Cong., 1st Sess., 1951, U. S. Code Congr. Service, Vol. 2, pages 1472, 1500). It provides:

"Likewise, it should be observed that the new section permits the induction of persons now or hereafter deferred until the thirty-fifth anniversary of their birth should their basis for deferment terminate after passing their twenty-sixth birthday. This will prevent persons now deferred from escaping induction by continuing their education past the twenty-sixth anniversary of their birth."

The deferment of petitioner as a college student had terminated before he reached his twenty-sixth birthday. He was taken out of the II-S college-student classification on May 28, 1953. This was three months before he reached his twenty-sixth birthday. Inasmuch as the college-student deferment terminated before he was twenty-six, and did not continue and was not reinstated after he passed his twenty-sixth birthday, his liability for training and service did not extend beyond his twenty-sixth birthday. He fought for a deferment classification and lost. The board put him in the I-A classification before he was twenty-six years old. During his many protests and his two appeals his induction was postponed. This was not a deferment given by the board under the statute and regulations.

The deferment in the statute contemplated a deferment that would carry the registrant beyond his twenty-sixth birthday through a II-S or college-student classification by the local board. The local board refused to continue the deferred classification until or beyond the twenty-sixth birthday. The petitioner consequently is not liable until he is thirty-five because his induction was postponed during his appeals for relief against the denial of his procedural rights by the board. On and after his twenty-sixth birthday he was in a classification which made him liable for training and service and therefore his liability was not extended. He was not deferred.

Petitioner sought the student classification beyond his twenty-sixth birthday. He asked the board to classify him properly so that his schooling could continue as contemplated by Congress. He asked for a deferment which would have extended his liability beyond his twenty-sixth birthday. The local board refused to classify petitioner so as to bring him within the extended liability age group. It denied him the benefits of the student exemption contemplated by Congress. Accordingly he did not get the detriments of extended liability for service beyond his twenty-sixth birthday. The local board refused to follow the procedure commanded by Congress to extend the liability beyond the twenty-sixth birthday. It could not, therefore, defy the statutory procedure for deferment by denying the II-S classification and at the same time extend the liability by postponement of induction. The local board so stated when it informed petitioner in its letter of August 10, 1953, that he was not entitled to carry the II-S classification any longer.

It is plain from the provisions of the law and from the House Report, interpreting the act, that the extension of liability until the age of thirty-five is contingent upon the deferment and the "basis for deferment" terminating after the deferred registrants passed "their twenty-sixth birthday." The Report, emphasizing the importance of the deferment terminating after the twenty-sixth birthday must be considered by the Court as a part of the act or the act must be interpreted so as to give it this emphasis expressed in the Report. (*Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 333 (1909); *Northern Pacific Co.* v. *Washington,* 222 U. S. 370, 380 (1912); *McLean* v. *United States,* 226 U. S. 374, 380 (1912).) The report of the Senate on the Selective Service Act of 1948 was referred to in *Dickinson* v. *United States,* 346 U. S. 389, 394 (1953). By force of the same reason it is proper and necessary to be guided by the above report in this case under the Universal Military Training and Service Act.

The interpretation placed on the act by the court below ignores the crucial distinction of the deferment extending beyond the twenty-sixth birthday made by Congress itself in the above quoted report. The construction by the court below agrees with the interpretation placed on the act by the Director of Selective Service, contrary to Congress. The interpretation of the court below, as well as that of the Director of Selective Service, seems to fly in the teeth of the congressional construction placed on the act expressed in the above quoted report.

It is the position of the court below, as well as of the Director of Selective Service, that any deferment under the act given at any age and, taken away at

any time before the registrant reaches his twenty-six birthday *per se* makes him liable regardless of whether it extends beyond the twenty-sixth birthday. (See exceptions listed under paragraph 4 of Local Board Memorandum No. 38, as amended September 1, 1954, appearing as Appendix E to this petition.) Does this not place a fearful and powerful discretion in the board to extend the liability of any registrant? Could not a board, under the authority granted to it by the court below, place a man in the II-S status for a period of a few weeks at any time before he reached his twenty-sixth birthday and thus extend his liability until he was thirty-five years of age?

It is plain that Congress did not intend to permit any such injustice. Congress intended to be fair and intended that a man who was granted a deferment and was not taken out of it by his board and made liable for service before he was twenty-six years old should alone continue liable until he is thirty-five years old. And it did not intend to say that all persons who may have possessed a deferment at any time before they reached their twenty-sixth birthday should all automatically be subjected to liability until their thirty-fifth birthday. When Congress spoke of "deferment" extending liability until the age of thirty-five it qualified the word "deferment" by limiting it to a deferment that extended beyond the twenty-sixth birthday.

It is apparent that the local board let its anxiety to induct petitioner into the armed forces before he was twenty-six years old blind it to the law. Obvious it is that the board erroneously thought that it had to put him in I-A before he was

twenty-six and postpone induction so as to make him liable beyond his twenty-sixth birthday. But this was not the procedure prescribed by the Selective Service System.—50 U. S. C. App. § 456 (i) (1) (2); 32 C. F. R. §§ 1622.15, 1622.25.

The President, pursuant to the act, had provided for II-S deferred classification as petitioner's proper classification while he was studying and taking the bar examination so as to comply with the mandate of Congress in the act. Had this deferment been carried, it would have taken him beyond his twenty-sixth birthday and made him liable until he was thirty-five years of age, as provided by 50 U. S. C. App. § 456 (h). The ignorance of the local board as to the procedure of the law, and its erroneously thinking that it was necessary to classify petitioner I-A before he was twenty-six, produced speed and an intention for expediency filled with denials of due process, rather than compliance with law. Had the local board followed the law and kept petitioner in II-S until he was twenty-six years old so as to extend his liability until he was thirty-five, the court below would not have been plagued with the serious problem of determining the congressional intent.

There was no extension of liability because of a postponement of induction. Petitioner was not given a college student deferment, the II-S classification. When he fought his case, appealed and claimed denial of due process, and his induction was postponed, he was still illegally classified I-A. It was not because of his school status that he was not inducted. It was because petitioner appealed for relief from a denial of a personal appearance and procedural due process. The board was ordered finally to withhold induction

the last time because it had previously cancelled the order to report for induction when it reclassified him. The court below assumed that there was a postponement of induction but this is an erroneous conclusion. The record shows otherwise.

The first order to report for induction was issued on June 17, 1953. (R. 39) This was based on the I-A classification given to him on May 28, 1953. (R. 7, 37) But on June 1, 1953, petitioner appealed the classification. (R. 37, 38, 40) On July 6, 1953, he requested a personal appearance from the June 29, 1953, classification. As early as February 9, 1952, petitioner had made his first request for a personal appearance. (R. 62, 32-33)

The requests for personal appearance and appeal had the effect of staying induction or postponing it. (32 C. F. R. §§ 1624.3, 1626.41) But it should be remembered that the local board took action thereafter which legally cancelled the induction. This occurred on June 29, 1953, when the local board reopened the case and reclassified petitioner in Class I-A(P), which meant that the issuance of the induction order would be stayed. See the minutes of actions on the back of the questionnaire and on the cover sheet. (R. 59) "When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."—32 C. F. R. § 1625.14.

It is because of the reopening and reclassification on June 29, 1953, followed by a timely request for personal appearance, and on account of the above section of the regulations, that the Director of Selective Service wrote to the State Director of Selective Service for Pennsylvania on April 14, 1954, and stated, among other things: "The classification action taken by the Local Board on June 29, 1953, cancelled the outstanding order to report for Induction. Consequently at the present time there is no outstanding valid order to report for Induction." (R. 59)

From June 29, 1953, the induction order being automatically canceled by law on that date, until October 25, 1954, there was no legal order to report for induction in existence against petitioner. There was no order to postpone. The so-called sixty-day extension and other postponements referred to in the opinion of the court below did not exist in law. They were not worth the cost of the paper they were written on. The statements of the local board about postponement were not continuations of a valid order for induction as was thought by the board and the court below. All that existed was the I-A classification with issuance of the order postponed.

There is a vast difference between postponement of the date of issuance of an order and the date to report for induction. In the former a new order must be issued. In the latter the old order is merely carried into effect by giving notice by letter of the new date of induction. The interpretation here taken on the question is corroborated by the action of the board itself. It issued a new order to report for induction on October 25, 1954, commanding petitioner

to report on November 23, 1954. This was the first time an order to report had procedurally properly issued. Until the final order to report was issued there had been and there was no outstanding order to report for induction issued or postponed, regardless of the good faith belief of the local board. The court below has held that good faith belief does not transform violations of law by a board into valid action.—*United States* v. *Zieber,* 3rd Cir., 1947, 151 F. 2d 90; Cf. *Niznik* v. *United States,* 6th Cir., 1950, 184 F. 2d 972.

It is plain, therefore, that there was not a legal extension of liability on the part of the local board beyond the twenty-sixth birthday of petitioner. He was not granted the school deferment. His induction was not postponed because of a deferment. Induction was canceled by reason of the reclassification. There is no basis whatever for the assumption that the liability extended beyond this twenty-sixth birthday.

The importance of this question is manifest. There are hundreds of thousands of college students throughout the country who are involved. Hundreds of thousands of high school students and first year college students have been deferred under the same act and regulations. And there are many other deferments that are provided for by the regulations such as IV-F (mental, moral and physical unfitness) that affect millions of other registrants. If the mere possession of any of these deferments at any time before the registrant reaches the age of twenty-six extends the liability until he reaches the age of thirty-five then the holding of the court below takes on even greater importance because it affects a larger seg-

ment of the population, hundreds of thousands, if not millions more people.

Under Local Board Memorandum No. 38, issued by National Headquarters of Selective Service System on October 30, 1951, and amended on September 1, 1954 (see Appendix E), the subject of extended liability to the age of thirty-five is considered. To show the extremely large class of registrants—millions—affected by the decision of the court below, the Court is referred to such Local Board Memorandum, appearing as Appendix E to this petition.

All persons who may be members of the National Guard, Reserve Officers' Training Corps, aviation cadets, high school and college students, persons engaged in certain occupations, persons with dependents, certain officials, state and federal, persons physically and mentally incapacitated, have extended liability for training and service until the thirty-fifth anniversary of their birth. The number of registrants touched by the decision of the court below now number over four million. Because of the large number of persons affected by the decision of the court below, the importance of the question here involved is very great. It cannot be said that this case is isolated or localized. Certain it is that an untold number of registrants who may have been deferred at some time before their twenty-sixth birthday are affected by the decision of the court below.

The extreme importance of this question demands that this Court grant the writ of certiorari and take the case in for argument and decision.

## IV

The court below decided a question of federal law involved in this case in a manner that is in direct conflict with applicable decisions of this Court. The court below failed to hold that the local board had no jurisdiction to issue the second and last order to report for induction, because there was no basis in fact for the denial of the over-age, V-A, classification. The final I-A classification by the appeal board on which the last order to report was based is arbitrary and capricious because petitioner was over-age and entitled to receive only the V-A classification at such time.

On May 28, 1953, petitioner was classified I-A by the local board. (R. 7, 37) The local board reopened the case and reclassified petitioner on June 29, 1953 and gave the I-A (P) classification. See the minutes on the back of the questionnaire. (R. 59) While in this I-A classification petitioner reached his twenty-sixth birthday on August 28, 1953, without being under a legal order to report for induction. The order to report dated June 17, 1953, was invalid and later canceled by the reopening of June 29, 1953, and the reclassification to I-A (P). After June 29, 1953, and until October 25, 1954, there was no order to report for induction in existence. No order to report issued until October 25, 1954, when petitioner was ordered to report for induction on November 23, 1954. (R. 27, 59)

The first appeal board classification was on November 20, 1953, when petitioner was given I-A. (R. 59) This was three months after he had become twenty-

six, on August 28, 1953. This appeal board classification was set aside by the local board on May 17, 1954, when it reopened the classification and gave petitioner I-A. (R. 25, 54, 59) When the local board began reprocessing petitioner with a fresh start he was over twenty-six years old. He was twenty-seven when the appeal board finally classified him I-A on October 22, 1954. (R. 26, 56, 59) On such date and thereafter when, based on such classification, he was ordered to report for induction on October 25, 1954, he was over-age for induction into the armed forces, according to the act. And his liability had not been legally extended to thirty-five by a deferment beyond his twenty-sixth birthday.

It was the responsibility of the appeal board to classify him according to his status at the time of the classification and not according to his status at the time of registration or at the time of filing the questionnaire. (*Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633.) Since he was over twenty-six years of age and inasmuch as he was not deferred at the time he reached that age, the statute required the appeal board to classify him in V-A as over-age.—50 U. S. C. App. § 456 (h).

Section 1622.50 of the regulations (32 C. F. R. § 1622.50) excepts from the V-A over-age classification persons who have been previously to their twenty-sixth birthday deferred from service under the act. Insofar as the regulation may be said to deny the over-age classification to registrants not in a deferred status at the time they are twenty-six, but who may have previously had a deferred classification, it is in conflict with the statute, as pointed out in the

discussion above under Point III. The regulation, as construed by the court below, brings it into conflict with the statute and makes it void.—*Sterrett* v. *United States,* 9th Cir., 1954, 216 F. 2d 269; *Bates* v. *United States,* 348 U. S. 966 (1955); *De Moss* v. *United States,* 349 U. S. 918 (1955).

It is plain that the undisputed evidence before the appeal board at the time of the final I-A classification showed petitioner was over-age. When the appeal board denied the over-age V-A classification it did so without basis in fact. The final I-A classification is therefore arbitrary and capricious. The holding of the court below is in direct conflict with *Estep* v. *United States,* 327 U. S. 114, 122-123 (1946), and *Dickinson* v. *United States,* 346 U. S. 389, 394 (1953).

## V

The court below decided matters of the federal draft law in conflict with the holding of another court of appeals and out of harmony with decisions of this Court when it held that the denial of personal appearance was cured by (1) giving petitioner delay of induction, (2) petitioner's superior knowledge of the law, and (3) the holding of a hearing after the cause for deferment as a student had ceased to exist. Petitioner will attempt to show the conflict as well as the great public importance of the question in the discussion to follow.

From the time that the board took away petitioner's deferment during his last year in law school to the time he took his bar examination he lawfully claimed a student deferment in Class II-S. This claim was

based on his full-time study in law, his graduation and his finally taking the bar examination. During all this time the law entitled him to the statutory deferment. On denial of the deferment he requested a personal appearance to discuss his right to the statutory deferment. The personal appearance for this purpose was never granted. He never had an opportunity to discuss his right to a student deferment while the grounds therefor existed. After he had finished school and completed his bar examination the State Director ordered the local board to grant a personal appearance. But this was too late to do petitioner any good. The board did not do as ordered by the State Director or as required by 32 C. F. R. § 1624.2. Instead it held a preclassification hearing. At this hearing on May 17, 1954, the basis for the student deferment had passed and there was nothing to discuss on the subject of student deferment. It did petitioner no good to have his hearing at such a late date. The injury had already been done.

Petitioner was entitled to a personal appearance and hearing during the time he sought the student deferment but it was denied. This was a time when it would do some good. After he had passed the bar examination was not time for the board to purge itself of the violation. For the purging by the board to be effective it had to be during the time petitioner had grounds to talk about his student status. When the hearing was finally conducted the board had no jurisdiction of the student deferment because it ceased to exist. It was only for the purpose of discussing the deferment that he needed the personal appearance. When the grounds therefor ceased to exist there was no need of it. It cannot be said that

the later hearing cured the denial of a personal appearance needed during the time he was a law student.

The court below held that he got what he asked for, namely, delay. He did not ask for delay. He asked for a deferred classification of II-S. But he never got it. The main reason for the delay he got was because he appealed from the denials of personal appearance. It was not because the local board complied with the law. The appeal board did not give him delay. It arbitrarily refused a deferment he clearly was entitled to. It gave him Class I-A.

The case of *Lancaster* v. *United States,* 1st Cir., 1946, 153 F. 2d 718, 720, relied on by the court below is not in point. In that case the appeal board gave the appellant the classification he sought. Here the appeal board did not give petitioner what he sought, the student deferment on the first appeal, or the over-age classification on the second appeal. The case here is different from the *Lancaster* case relied upon the court below because here petitioner never was given what he asked for by the appeal board.

The local board in the face of such a record, illegally denied the statutory deferment, harassed him with illegal classifications, followed this by sending him orders to report for induction that were ordered cancelled because invalid by the Director and State Director. In the face of this record the local board persisted down to the last hour of processing petitioner in the denial of the right to a personal appearance and overruled petitioner's objections that he was being denied procedural due process of law. The court below held erroneously that the denial of procedural due process of law was harmless.

The holding of the court below is out of harmony with decisions of this Court requiring a strict compliance with procedural guarantees under the draft law. The holding of the court below also directly conflicts with the holdings of other courts of appeals as will be demonstrated. Another reason why this Court ought to take jurisdiction by granting the writ is because the question involved is of nation-wide importance. It affects millions of registrants who are entitled to have the guaranteed right of personal appearance not taken away from them.

Because of the conflict of decisions and the importance of the question, the petition for writ of certiorari should be granted. The holding that the denial of personal appearance, a procedural right guaranteed by law, was harmless error, is a holding that is out of harmony with *Simmons* v. *United States,* 348 U. S. 397 (1955); and *Gonzales* v. *United States.* 348 U. S. 407 (1955).

In *Simmons* v. *United States, supra,* where the hearing officer of the Department of Justice did not give a full and fair summary of adverse evidence appearing in the FBI report used by him, the Court said that it was not necessary, in order to claim prejudice, to show "the precise manner in which he would have used this right—and how such use would have aided his cause." To the same effect was *Gonzales* v. *United States, supra,* where the Department of Justice and the appeal board did not mail to the registrant a copy of the adverse recommendation on the conscientious objector claim after the departmental hearing. In that case the Government argued that Gonzales did not show any prejudice or injury. The Court dismissed the argument without discussion be-

cause of its holding reached the same day in the *Simmons* case.

Here the case is even stronger than the *Simmons* and *Gonzales* cases. There the procedural rights denied by the administrators of the act were not expressly guaranteed. Here there is an express guarantee by the act and the regulations that a registrant be granted a personal appearance. When the violation, as here, is of an express command of law the denial of a procedural right is *per se* evidence of prejudice. It is not necessary to prove or show anything else in order to establish it. Prejudice necessarily follows from a violation of the express commands of the law. The Government cannot show that petitioner was not prejudiced. The court below erroneously found so. It is not a mere shifting of the burden of proof or of going forward with evidence but it is a conclusive presumption.—See *Arndt* v. *United States,* 5th Cir., 1955, 222 F. 2d 484; cf. *Kotteakos* v. *United States,* 328 U. S. 750, 760-761 (1946).

The court below quotes from *Dickinson* v. *United States,* 346 U. S. 389, 394 (1953), about the narrow review in its opinion. But the *Dickinson* decision dealt with classification. It did not involve a denial of procedural due process of law. Judicial review is strictly limited when the question of classification itself is under review. However when there is under consideration a question of whether the local board has denied procedural due process of law the reverse is true. Courts are liberal to the registrant and deal strictly with the local board to see that procedural regulations are strictly complied with. The reason is that the scope of review in Selective Service cases

as far as classification is concerned is limited and restricted.—*Estep* v. *United States,* 327 U. S. 114, 121-122 (1946).

Where the review of administrative action, as here, is restricted there must be a strict compliance with the requirements of procedural due process by the administrative agency. (*N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446) For the final order to be valid the local board must comply strictly with the procedural requirements.—*Ver Mehren* v. *Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; Ex parte *Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, 147-148; *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 358; *Davis* v. *United States,* 6th Cir., 1952, 199 F. 2d 689; cf. *Berman* v. *Craig,* 3rd Cir., 1953, 206 F. 2d 888.

The holding of the court below that there was a sufficient compliance with procedural due process of law when petitioner was denied his right to personal appearance is in direct conflict with the above decisions by different courts of appeals holding that there must be a strict compliance with procedural due process of law.

At different places in the opinion of the court below it is emphasized that petitioner was a law student and later passed the bar. Then the statement is made that petitioner's "tree of legal knowledge commenced to bear fruit and a litigious spirit replaced his five year contentment with his draft board." (225 F. 2d at p. 76) Reference to the parts of the opinion where there is talk about petitioner's being a law student and

later a lawyer proves that the court below held that petitioner was not prejudiced because he was well educated, legally trained and skilled. The question is one involving procedure, not petitioner's knowledge, experience or reactions.

Neither Congress, in the act, nor the President, in the regulations, has said anything about the skill and learning of a registrant. Their silence on the subject of education in determining whether prejudice is shown shuts off the court below from making it an element.

The young lawyer, no less than an ignorant farm boy, stands in the same shoes at the bar of justice when a question of procedural due process of law is concerned.

The holding of the court below that petitioner was not prejudiced by the denial of a personal appearance is based upon another assumption that petitioner submits is incorrect. This assumption is that he got what he asked for, namely, delay, and that he could not possibly be harmed by any illegal action of the board during such time. The matter seems summed up in one sentence of the opinion of the court below: "The record shows that the board disregarded all objections, but granted appellant the time he desired." (225 F. 2d at p. 77) This is an aberration from the path of the law. To hold that a denial of procedural due process of law is cured by a stay of execution of the victim is itself a violation of the law. A stay never validates procedures that vitiate the judgment of a tribunal.

The court below says that petitioner "accepted both of his II-S classifications", that he "was fully satis-

fied with the board's action and its procedure" and that petitioner "did not appeal from the second II-S" classification. (225 F. 2d at pp. 76, 74) There was no reason to appeal. This student deferment was what he wanted. He was satisfied until it was taken away in his last year at law school. Under the law he could appeal only from the I-A classification. There is no obligation for the local board to send a file to the appeal board when the classification does not impose a liability. The appeal board deals with realities—liability for service—and does not decide academic questions. The different classifications, other than I-A, I-A-O and I-O, do not impose a duty upon the registrant and there is no appeal from them. Petitioner did not have to appeal from anything but Class I-A. He lost no rights and cured no denial of procedural due process by not appealing from the II-S classification.

Petitioner had what he wanted, Class II-S. But this was only from February 9, 1952, to June, 1953. (R. 6, 34, 35, 36, 37, 59) On May 28, 1953, he was given what he did not want, Class I-A. From that date until the induction date his case showed violations of the regulations by the board and threats of induction and harassment by it, contrary to the provisions of the law exempting students in college. It is true that the board reopened and reconsidered his classification and gave him Class I-A (P) on June 29, 1953. This reclassification by the local board had the legal effect of canceling the induction notice and guaranteed the right of personal appearance which was denied. But the local board thereafter persisted in making its threats of induction and harassment of petitioner when it had no authority to order induction. It is true that the local board granted a few

weeks' postponement. That is why the suffix "P" appears behind the I-A on June 29, 1953. But all this was contrary to the procedure fixed by National Headquarters of Selective Service System.

From the date the first I-A was given on May 28, 1953, to and including January, 1954, when petitioner took the bar examination, the board should have kept him in II-S, a deferred classification. But it did not do so. It held the Damocles' sword of induction over his head thereafter contrary to procedure fixed by law. Subdivision 3 of Local Board Memorandum No. 53, issued March 9, 1953, by National Headquarters of Selective Service System, provides that the statement of the college that petitioner was satisfactorily pursuing a "full-time course of instruction at a college, university, or similar institution of learning shall be accepted by the local board as information justifying deferment of the registrant." Under the law the board should have accepted the proof submitted by petitioner and granted the deferment.

The I-A classification with the induction postponed was not equivalent to Class II-S according to law. There is as much difference between the two as there is between a horse and a mare. The Class I-A was not what petitioner wanted and it is erroneous to say that he got what he wanted. He desired II-S, not I-A. The law intended that he have Class II-S so he could pursue what the law intended (his studies) unmolested with threats of induction. That the illegal threats of induction made constantly during his period of training and study for the law were not carried out is not equal to a II-S classification so as cure the illegal action of the board in denying a valid request for a personal appearance. The last classifica-

tion during his law school period was I-A (P) on June 29, 1953. This was a reopening and reclassification. He made a timely request for personal appearance on July 6, 1953. (R. 40-41)

The personal appearance was never granted. The first appeal board classification was given on November 20, 1953. This had taken the place of the local board classification of June 29, 1953. When the hearing was held on May 17, 1954, this was not a personal appearance because there was then no outstanding local board classification authorizing a personal appearance under 32 C. F. R. 1624.2 The May 17, 1954, hearing was a local board preclassification hearing and not a personal appearance.

The file was later sent to the appeal board in disregard of the right to a personal appearance. This was in violation of law. See *United States* v. *Romano,* S. D. N. Y., 1952, 103 F. Supp. 597; cf. *United States* v. *Laier,* N. D. Cal., 1943, 52 F. Supp. 392; *United States* v. *Peterson,* N. D. Cal., 1944, 53 F. Supp. 760; *United States* v. *Derstine,* E. D. Pa., 1954, 129 F. Supp. 117. The case of *Talcott* v. *Reed,* 9th Cir., 1954, 217 F. 2d 360, conflicts with the holding of the court below. This conflict is sufficient to require the granting of the writ of certiorari in this case.

The court below approved the illegal action of the local board in holding a preclassification hearing and refusing to reopen the case and then allow petitioner his right to a personal appearance. After being directed to conduct a personal appearance by reopening the classification, the local board merely conducted a hearing which was not a legal personal appear-

ance. This holding by the court below is out of harmony with what this Court said in *Estep* v. *United States,* 327 U. S. 114, at page 121: "If a local board refused to reopen on the written request of the State Director a registrant's classification and refused to cancel its order to report for induction, it would be acting in the teeth of the regulations. In all such cases its action would be lawless and beyond its jurisdiction."

The opinion of the court below refers to the testimony of petitioner showing knowledge of what was being done by his board and his skilled knowledge of the law. It has been pointed out above that knowledge plays no part in the determination of the questions presented in this case. But assume that it does and it is shown at the trial. That is not enough. When a denial of due process appears in the draft board file, then regardless of what the defendant says in court later it cannot validate the illegal order. The court below was bound to decide the case according to the draft board records and not on petitioner's testimony. (*Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93; *Cox* v. *United States,* 332 U. S. 442 (1947).) The holding of the court below that petitioner's testimony can be relied upon in contradiction of the draft board file is a holding that directly conflicts with these two decisions.

It is submitted that the holding of the court below on the above point is out of harmony with decisions of this Court. The holding also conflicts with the holdings of other courts of appeals. In event there is found to be no conflict then this Court should

conclude that the holding is on an important question of law which has not been but ought to be decided by this Court.

## CONCLUSION

**For the reasons above stated it is respectfully submitted that this petition for writ of certiorari should be granted.**

Respectfully,

THOMAS D. MCBRIDE
2015 Land Title Building
Philadelphia 10, Pennsylvania

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

*Counsel for Petitioner*

November, 1955.

## APPENDIX A

### Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,515

---

UNITED STATES OF AMERICA ex rel. JUSTIN K. McCARTHY,
Appellant

v.

HAROLD H. COOK, Lt. Col., U. S. A., Commanding Officer, United States Army and Air Force Induction Center, Schuylkill Arsenal, Philadelphia, Pa.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

Argued April 5, 1955

Before BIGGS, *Chief Judge*, HASTIE, *Circuit Judge*, and WILLSON, *District Judge*

OPINION OF THE COURT

(Filed May 23, 1955)

WILLSON, *District Judge*

Appellant Justin K. McCarthy was inducted into the army on November 23, 1954, pursuant to the Universal Military Training and Service Act, 50 U. S. C. A. App. § 451, et seq. His induction was involuntary and under

protest. On the day of his induction he filed an application for a writ of habeas corpus in which he sought his discharge from service. A full hearing was had in the district court on the rule to show cause why the writ should not issue. The district judge discharged the rule and denied the writ. This appeal followed. The district court will be affirmed.

The evidence taken in the district court discloses the facts. They are not in dispute. In the district court and on this appeal, appellant asserts his induction was illegal because:

1. Local Draft Board No. 114, Northampton County, Pennsylvania, was illegally constituted.

2. He was denied procedural due process in that the board refused to give him a personal hearing as requested in writing on February 9, 1952.

3. He was classified I-A and while in such classification reached and passed the twenty-sixth anniversary of his birth and therefore the local board had no further jurisdiction to direct that he be inducted.

At the outset it is important to refer to the extent of the permitted judicial review of this type of case. The Supreme Court in *Dickinson* v. *United States,* 346 U. S. 389, at 394, said:

> "The Universal Military Training and Service Act does not permit direct judicial review of selective service classification orders. Rather the Act provides, as did the 1917 and 1940 conscription Acts before it, that classification orders by selective service authorities shall be 'final.' However, in *Estep* v. *United States,* 327 U. S. 114 (1946), a case arising under the 1940 Act, this Court said, at 122-123: 'The pro-

vision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.'"

The Supreme Court has also held that an inductee seeking a discharge by habeas corpus has the burden of showing that he was *prejudiced* by the procedure adopted and followed by the selective service officials. The range of inquiry is limited. The court does not sit in review. It is the impact of the procedure on the person seeking the writ that is crucial. Whatever potentialities of abuse a particular procedure may have, the case is at an end if the challenged proceeding cannot be said to have been so corrupted as to have made it unfair. *Eagles* v. *Samuels,* 329 U. S. 304, and *Eagles* v. *Horowitz,* 329 U. S. 317.

As the facts established in the district court are conclusive because uncontradicted, they are reviewed with the purpose primarily to inquire whether McCarthy established prejudice in his case.

Appellant was born August 28, 1927, at Bethlehem, Pennsylvania. He is a graduate of Lehigh University and of the law school of Columbia University. In 1945, appellant joined a naval reserve unit and entered training as a midshipman. His training duty as a midshipman ended in February, 1947. He registered under the 1940 Selective Training and Service Act on March 27, 1947. He was then in his twentieth year. Under the 1948 act, now Universal Military Training and Service Act, he registered September 10, 1948, with Local Board 114,

Northampton County, Pennsylvania. After returning his questionnaire he was classified I-D on August 11, 1949, which was based on his participation in the naval reserve. Appellant re-entered the naval reserve in September, 1948, but his re-entry did not qualify him for I-D because a condition precedent under the 1948 Act, effective June 24, 1948, for a I-D, required a minimum of ninety days of active duty in one of the armed services, that is army, air force, navy, etc., which appellant had not had. See 32 C. F. R. § 1622.13. At the date of the I-D classification, appellant was about to enter his senior year at Lehigh University. At that time he made no request to appear before the board, nor did he otherwise communicate with it. The I-D classification remained as such through 1950 and 1951. At the hearing in the district court, appellant acknowledged familiarity with the selective service regulations, and of the fact that under the 1940 Act his classification I-D was proper, but that under the 1948 Act it was improper. When the exact time that this realization came to appellant was not clearly shown. In February of 1952, while appellant was in his second year in law school, and after returning a questionnaire, he was given a I-A classification, the notice of which was dated February 5, 1952. On February 9, 1952, appellant wrote his board acknowledging the notice of classification, stating that he was a student in the law school at Columbia, and stating that he expected to attain his degree in June of 1953. He appealed from his I-A classification and also said in his letter: ". . . respectfully request that I be afforded the opportunity of appearing in person before your Board, No. 114." Appellant received no response from the board with regard to his request to appear. However, he very shortly did receive copies of SSS Form No. 109, one from Lehigh and one from Columbia. These forms were copies of a notice from each university to the draft board as to his student status. The record does not indicate that appellant requested that the universities prepare and send Form 109

to the board. The next communication from the board to appellant was a notice of February 27, 1952, placing appellant in Class II-S "until 6-52." In between his I-A and his II-S classifications, on February 11, 1952, Columbia by letter informed the board that appellant was a student and urged that he be given a student's deferment of II-S. Appellant did not appeal from the II-S classification, nor communicate with the board. The next notice from the board to appellant was on August 4, 1952, notifying appellant that he had been placed in Class II-S "until 6-53." As to this second II-S classification, appellant testified that he had sought the advice of the advisor to veterans at Columbia. He filled out a request form and ". . . dropped it in the box which was then picked up and processed by the registrar, which sent out a Form 109 again, . . ."

It is noted that the 1948 Act required that student classifications be reviewed annually. Appellant did not appeal from the second II-S, nor otherwise communicate with the board with regard thereto.

On May 28, 1953, appellant was classified I-A. On June 1, 1953, appellant wrote the board a two paragraph letter in which he acknowledged notice of his classification I-A, but said that he would not be eligible to graduate from Columbia until the first week of October, 1953; that he was not eligible to take the examinations for admission to the Bar of Pennsylvania without his degree; and that the registrar had assured him that he would forward a Form 109 as soon as his grades were computed and his scholastic standing determined, which would take place in the near future. The second paragraph of this letter requested the board to advise appellant whether he was entitled to take an appeal from the I-A classification until such time as Columbia informed the board as to his status or what procedure should be observed to preserve appellant's student classification ". . . until I receive my law degree in October, 1953."

This letter was not answered by the board and on June 17, 1953, the board mailed an induction notice. On June 22, appellant wrote the board requesting a postponement of induction to enable him to complete credits for his degree. In the meantime, appellant had entered summer school at Wisconsin for the purpose of making up his credits. The board first granted a five day and then a sixty day postponement of induction. While in Wisconsin, appellant first learned from his father of the postponement of his induction. Appellant's father was the government Appeal Agent. On July 6, 1953, from Wisconsin, appellant wrote another letter to the board. He requested that his case be reopened and again considered by the board. Among the reasons advanced for reconsideration were that he had received improper advice from the government Appeal Agent; that he had been denied the right to appear in person; that he was denied the right of being classified I-S by reason of the failure of the Appeal Agent and the board to properly advise him; that the board acted arbitrarily and capriciously in classifying him I-A without waiting a reasonable time to hear from Columbia; that the board acted arbitrarily and capriciously in classifying him I-A without allowing him thirty days in which to enlist or secure essential employment; and lastly, and for the first time, appellant asserted that the board was without jurisdiction. In the concluding paragraph of this letter, appellant, nevertheless, requested the board to ". . . restore me to my former and appropriate classification, namely II-S until I graduate from Columbia Law School in October, 1953, or I cease to satisfactorily pursue my course of study at said institution; or be classified in Class I-S pending the receipt of my graduate degree in October 1953." Appellant then said: ". . . If denied these rights I . . . request that you forward this request to the proper Appeal Board . . ." As the board made no reply to the July 6 letter, appellant on August 18 again wrote the board

appealing from any definitive action taken by the board in his case and again requesting a personal appearance. On September 1, 1953, appellant received notice that his previous induction order was postponed indefinitely by authority of the State Director. On direct examination, appellant said that early in September he received a letter from the local board notifying him that his file was at the appeal board in accordance with his request and that on its return he would be informed of "their decision." From the testimony it appears that the foregoing information was contained in the board's letter of September 9, 1953. Then on September 16, in another letter to the board, appellant took the position that he had not asked that his folder be sent to the appeal board but that he had been endeavoring for more than two months to have his case reopened to afford him the opportunity to appear in person before the board, and also in this letter, appellant asserted that he had never been legally classified after September 10, 1948 and requested that his letter be made part of his folder. On November 20, 1953, appellant was classified I-A by the Area Appeal Board. On November 30, appellant wrote Col. Henry M. Gross, State Director. He mentioned the lack of a previous hearing and cited decisions of the United States courts to the effect that registrants have the right to appear in person and that a local board may not deny such right. The record shows no reply from the State Director to appellant's letter, but it was followed on January 7, 1954, by a notice from the board to appellant to appear for a hearing set for January 12. On January 9, appellant by letter to the board acknowledged the notice of the hearing. In his letter, after quoting the notice of the board, appellant says: ". . . Please let me have by return mail unequivocal answers to each of the following questions, to wit: . . ." Then appellant asked eight ques-

tions* and concluded: "Without full and complete answers to each of the above questions it will be utterly impossible for me to adequately discuss and fully present my reasons for a reclassification."

Without answering the interrogatories propounded by appellant, the board simply notified appellant on January 11 to appear at the meeting January 12 as originally set, and in the notice said: ". . . at which time you will be given an opportunity to discuss your case in full with the Local Board." Following receipt of that letter, appellant wired the board on January 12, 1954 at 4:00 p. m., requesting postponement of the hearing because he was in Philadelphia attending informal bar review school in the evenings. His request was granted and no hearing was held on the 12th. On January 19, appellant again wrote the board insisting that all his procedural rights

---

* "1. At whose request have you directed me to appear at a meeting of your Board to be held on Tuesday January 12, 1954, at 8:00 p. m.?

"2. If your request is pursuant to a directive of the State Director, the date of the State Director's notice or directive to you?

"3. If your request for my appearance before your Board is in response to any request from me to appear in person before your board to discuss my classification, which one of my several requests is responsible for the proposed meeting to be held on Tuesday January 12, 1953?

"4. If such meeting is not being held in response to any request from me, will all the members of Local Board No. 114 be present, and are all the members of Local Board No. 114 residents of Northampton County, Pa.?

"5. Has the Local Board opened my case at the Direction of the State Director to consider my classification anew at the meeting to be held on Tuesday January 12, 1954?

"6. If the State Director has not directed you to open my case and consider it anew, has the Local Board opened my case and will it consider anew my classification on Tuesday evening January 12, 1954?

"7. Has the State Director furnished you with a list of questions to ask me at the meeting proposed to be held on January 12, 1954?

"8. If so what are the questions?"

be afforded him, asserting that he had never waived any of them. In another letter of February 4, 1954, appellant in substance made the same assertion to the State Director with a copy to the local board. On May 3, 1954, a letter from the State Director acknowledged appellant's previous letters. The local board then notified appellant to appear for a hearing on May 17. Appellant did appear before the board on May 17, 1954, the date fixed. Appellant says that at the hearing he contested the jurisdiction of the board over his person and contested the composition of the board as well. Appellant presented a written statement which summarized his position and referred to what appellant considered the pertinent parts of the Act and the regulations and a complete history of his case. All members of the board were present. The following day appellant received a I-A classification from the local board. He appealed from that classification within the ten day period. On October 22, 1954, appellant was notified that the Area Appeal Board had denied his appeal. He then received his induction notice. Appellant was inducted on November 23, 1954.

A reference to appellant's second and third points in the light of the evidence reveals clearly that appellant was not prejudiced by the manner in which his case was handled before the selective service officials. Appellant testified at considerable length in the district court. All of the evidence on this phase of the case comes from his testimony and the exhibits which he identified. Appellant claims that the failure of the board to afford him a hearing, as requested in February of 1952, at the time his classification was first changed from I-D, is such error as vitiates the whole proceeding. The government answers that the failure to grant the requested 1952 hearing was not prejudicial. In his request for that hearing, appellant informed the board that he was a student in law school at Columbia and that he expected to get his degree in June of 1953. His request followed his I-A classification. It is apparent that the board regarded the

letter as a request for a student deferment which the board promptly granted.

The evidence shows that appellant accepted both his II-S classifications, indeed his second one was as the result of his own instigation. He was aware of the purpose of Form 109, and certainly of the likelihood that the board in view of his first student deferment, would grant him a second to enable him to graduate. His letter of June 1, 1953 followed his I-A classification made May 28, 1953. He told the board he would not graduate until October, 1953, and that he could not take the bar examinations without his degree. He again referred to Form 109 and that the registrar of Columbia would forward it to the board as soon as his grades were computed. He inquired as to what procedure should be observed ". . . to preserve my student classification until I received my law degree in October 1953 . . ." Without replying to appellant's letter, the board directed an induction notice to issue on June 17, 1953. Until the induction notice, it may be fairly said that appellant was fully satisfied with the board's action and its procedure. It is appparent from the record that on receipt of the induction notice appellants' tree of legal knowledge commenced to bear fruit and a litigious spirit replaced his five year contentment with his draft board. In his letter of July 6, 1953, from Wisconsin, appellant, in shotgun fashion, covered the field in searching for defects in the manner in which his case was handled. Nevertheless, in the final paragraph he again pleaded with the board for restoration of his former and appropriate classification, namely II-S, until he received his degree in October of 1953. During the summer and early fall of 1953, appellant made objections to the procedure as well as all prior classifications given him, yet he did not stand on the objections. He continually asked for time in which to complete his studies. The record shows that the board disregarded all objections, but granted appellant the time he desired. A personal appearance before the board could have given appellant

nothing more than he gained by the board giving him his two II-S classifications followed by postponement of his induction on September 1, 1953 for an indefinite period. When the board set the date for the January 12, 1954 hearing, appellant had graduated from Columbia and was engaged in studying for the bar examinations. He wanted still additional time. Even after receiving the vexatious series of questions, which have been noted, in response to its notice of the hearing fixed for January 12, the board again granted appellant additional time pursuant to his telegram request. The evidence shows conclusively that the board gave appellant fair and generous treatment from his registration to his induction. The conclusion is that appellant has failed to show that he was prejudiced in any way by the failure of the board to grant him a hearing in 1952. See *Lancaster* v. *United States*, 153 F. 2d 718, where, on 720, it is said:

> "Thus he gained his end without the necessity of appearing personally before his local board. A personal appearance could have given him nothing more than he gained by his appeal and thus the error of the local board in refusing to hear the appellant personally was purely a technical one which could not have prejudiced any right secured to the appellant and does not justify setting the subsequent order to report for induction aside as invalid."

As to appellant's second point, that is, that he had passed the twenty-sixth anniversary of his birth at the time of his induction, but little need be said. 50 U. S. C. A. App. § 456, which is Section 6 of the 1948 Act, provides:

> "(h) The President is authorized, under such rules and regulations as he may prescribe, to provide for the *deferment* from training and service . . . of any and all categories of persons . . . whose activities in study . . . are found to be necessary to the na-

> tional health, safety or interest . . . (Emphasis supplied) *Provided further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National Security Corps under the provisions of section 4 (a) of this Act until the thirty-fifth anniversary of the date of their birth." (50 U. S. C. A. App. § 456 (h))

Appellant construes the foregoing to mean that only service beyond twenty-six years may be compelled in those cases in which the registrant was classified in a student status at the date of his twenty-sixth birthday. Appellant's twenty-sixth birthday was August 28, 1953. Admittedly on that date he was classified I-A, but the board had granted him a sixty day postponement which was then in effect. The evidence shows that the reason for the sixty day postponement of induction was because of his plea to the board to be permitted to make up the deficiencies in his studies in the hope of graduating in the fall of 1953, as contained in his letter of June 1. As we understand it, appellant's contention is that for him to be liable for service beyond his twenty-sixth birthday, he should have, on that date, been placed in one of the student classifications, that is I-S or II-S. We see no merit in such a contention under the situation presented here. It is believed that the board acted within the discretion permitted it. The board chose not to continue the II-S classification, but postponed induction under a I-A, which again was exactly the result sought by appellant. He was certainly deferred within the meaning of Section 6 of the Act, and was not prejudiced by the board's action.

Finally, we turn to appellant's contention that the board was illegally constituted and as a result had no jurisdiction over him. He contends that the jurisdictional area given the board by the State Director is not authorized by the statute or regulations and that the members of the board did not meet the residence requirements.

The *Pennsylvania Selective Service Local Board Areas* manual, issued by the State Director, effective for the period of time under review here, lists Northampton County Local Board No. 114 as having jurisdiction of the City of Bethlehem, Wards 1 to 17, inclusive, which are all the wards in the City. The manual lists, in addition, for Northampton County, Boards 112, 113 and 115, and for Lehigh County, Boards 89, 90 and 91.

The office of Local Board 114 is in a bank building in the City and in Northampton County. Wards 1 to 9 and 14 to 17, both inclusive, are in Northampton County and Wards 10, 11, 12 and 13 are in Lehigh County. Appellant contends that this board is thus a hybrid board, as its jurisdictional area crosses county lines, an arrangement which he says is illegal under the statute. He says, that as only one board member was a resident of Northampton County, the board is thus illegally composed. The appellant also contends, and we agree, that the board cannot be construed as an intercounty local board. With reference to the creation and establishment of local boards, 50 U. S. C. A. App. § 460 (b) authorizes the President in Section (3):

> ". . . He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State . . . Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials: *Provided,* That an intercounty local board consisting of at least one member from each component county or corresponding subdivision may be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State . . .
>
> • • • •
>
> ". . . each member of any local board shall be a civilian . . . residing in the county or political sub-

division corresponding thereto in which such local board has jurisdiction."

We think that the board was legally established. The statute law is that one or more local boards in each county or political subdivision corresponding thereto of each state shall be created and established. Board 114 was given jurisdiction within a political subdivision, that is, the City of Bethlehem but in two counties. Nothing is said in the statute requiring that a board's jurisdictional area be restricted within county or political subdivision boundary lines. It is true that the language "in each county or political subdivision corresponding thereto of each State" requires a board in each county. What is meant by "or political subdivision corresponding thereto" is not entirely clear, but we think it is merely descriptive of the area in which Congress intended that at least one local board be established. Thus, as a minimum, a board should be in each county or a political subdivision of each state which generally, with regard to its jurisdictional area, should be of a size corresponding to a county or other appropriate political unit in those states and territories which do not have counties, such as Louisiana. This same phrase was used in the 1940 Act and is also used in the language in (b) (3) relating to intercounty local boards, in referring to areas of jurisdiction not exceeding five counties or political subdivisions corresponding thereto. It is evident that the words "political subdivision corresponding thereto" were not intended by Congress as an express limitation of a jurisdictional area. If so, the result would create an impossible situation, as for instance, it is doubtful that there exists anywhere in the country a political subdivision corresponding to an area not exceeding five counties.

Regulation 1604.51 is entitled "*Areas.*" The State Director of each State is required to divide his state into local board areas. Normally in such area there

should be a population not exceeding 100,000. The directive requires at least one separate local board area in each county. In this instance, in Northampton County, there are four local board areas, and in Lehigh County, three local board areas. Also, each local board area shall be entirely within one appeal board area. It is noted at this point, however, that neither statute nor regulation 1604.51 requires that each local board area be confined within county lines. This section should, therefore, be construed as requiring that the President shall create or establish one or more local boards in each county or political subdivision of each State, which was what was done here.

Concluding as we do, that the jurisdictional area of Local Board 114 is within the authorization of the statute and regulations, the members of the board certainly met the residence requirements on and after June 19, 1953. Before that date it is doubtful that the residence requirements had been met. Under the 1948 Act, the board was composed of Chairman Thevenet, a resident of the City of Bethlehem in Northampton County, whose membership on the board is not challenged; board member Bilheimer, who was also at all times a resident of the City, but of a ward situate in Lehigh County; and board member Hanners, whose residence at the time he was appointed is not too clear from the record. However, his residence soon thereafter became Bucks County, two miles from the city line, where he continued to reside until replaced by Collie on June 19, 1953. Collie's residence when appointed and thereafter was in that part of the City situate in Lehigh County. Thus, from June 19, 1953, until and after appellant was inducted, his draft board members lived in the jurisdictional area given the board by the State Director. In this respect, the statute requires that a member's residence be in *the* county in which such local board has jurisdiction and the regulation, 1604.52(c), says that the residences of members of a local board shall be

in *a* county in which the board has jurisdiction. The statute and the regulations are thus not inconsistent. As we have held that this board's jurisdiction, including the portions of two counties, is lawful, it also follows that the members met the residence requirements as they resided in the City and in the parts of the two counties in which the board had jurisdiction.

Lastly, with reference to appellant's classifications and the composition of the board at the times they were given, it should be recalled that the May, 1953 I-A was given while Hanners was on the board, but in September, after protest, his file was forwarded to the Appeal Board which gave him a new I-A classification in October. His final I-A classification was given after a full hearing held May 17, 1954. At that hearing, as we have shown, the board was properly constituted. All members were present. The I-A then given was timely appealed. The Area Appeal Board denied his appeal. Such action by the Appeal Board amounted to a new classification. See *United States* v. *Stiles*, 3 Cir., 169 F. 2d 455.

The judgment will be affirmed.

## APPENDIX B

### Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,515

UNITED STATES OF AMERICA ex rel. JUSTIN K. McCARTHY,
Appellant

v.

HAROLD H. COOK, Lt. Col., U. S. A., Commanding Officer, United States Army and Air Force Induction Center, Schuylkill Arsenal, Philadelphia, Pa.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*, and HASTIE, *Circuit Judge*, and WILLSON, *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in the cause be and the same is hereby affirmed.

May 23, 1955. ATTEST: IDA O. CRESKOFF, Clerk

Received & filed
May 23, 1955
IDA O. CRESKOFF, Clerk

## APPENDIX C

**Sur Petition for Rehearing**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,515

---

UNITED STATES OF AMERICA, ex rel. JUSTIN K. McCARTHY,
Appellant,

vs.

HAROLD COOK, Lt. Col., U. S. A., Commanding Officer, United States Army and Air Force Induction Center, Schuylkill Arsenal, Philadelphia, Pa.

---

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and HASTIE, *Circuit Judge,* and WILLSON, *District Judge.*

After due consideration the petition for rehearing in the above entitled case is hereby denied.

By the Court

JOSEPH P. WILLSON
District Judge

Dated:
August 15 1955

## APPENDIX D

### Selective Service Material

UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AS AMENDED
TITLE I

*Sec. 4 (a). Training and service in general.*—Except as otherwise provided in this title, every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title, or who is otherwise liable as provided in section 6 (h) of this title, shall be liable for training and service in the Armed Forces of the United States: *Provided,* That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: . . .

No person, without his consent, shall be inducted for training and service, in the Armed Forces or for training in the National Security Training Corps under this title, except as otherwise provided herein, after he has attained the twenty-sixth anniversary of the day of his birth.

*Sec. 6 (h) Occupations; Dependency; Fitness; Extension of age of liability; N. S. T. C.; Authority of Selective Service Boards.*—The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces or from training in the National Security Training Corps of any or all categories of persons whose employ-

ment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f) under the United States or any State, Territory, or possession, or the District of Columbia, or whose activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any such category shall be deferred except upon the basis of his individual status: *Provided further*, That the existence of a shortage or a surplus of any agricultural commodity shall not be considered in determining the deferment of any individual on the grounds that his employment in agriculture is necessary to the maintenance of the national health, safety, or interest: *And provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National Security Training Corps under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferable under any other provisions of this Act. . . .

• • • •

*Sec. 10 (b) Officials, employees, and boards; Printing; Paroles; Leases.*—The President is authorized— . . .

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title, together with such other duties as may be assigned under this

title. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials: *Provided*, That an intercounty local board consisting of at least one member from each component county or corresponding subdivision may be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State or comparable jurisdiction when the President determines, after considering the public interest involved and the recommendation of the governor or comparable executive official or officials, that the establishment of such local board area will result in a more efficient and economical operation. Any such intercounty local board shall have within its area the same power and jurisdiction as a local board has in its area. No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final,

except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final. No person who is a civilian officer, member, agent, or employee of the Office of Selective Service Records, or the Selective Service System, or of any local board or appeal board or other agency of such Office or System, shall be excepted from registration or deferred or exempted from training and service, as provided for in this title, by reason of his status as such civilian officer, member, agent or employee; . . .

SELECTIVE SERVICE REGULATIONS

*1622.15 Class I-S: Student Deferred by Statute.*—(a) In Class I-S shall be placed any registrant who has not attained the twentieth anniversary of the day of his birth and who is satisfactorily pursuing a full-time course of instruction at a high school or similar institution of learning. Such registrant shall be retained in Class I-S (1) until the time of his graduation from such school or institution, or (2) until he attains the twentieth anniversary of the day of his birth, or (3) until he ceases satisfactorily

to pursue such course of instruction, whichever is the earliest. The date of the classification in Class I-S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form No. 102) and be identified on that record as Class I-S (H).

(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I-S under the provisions of this paragraph (1) who has previously been placed in Class I-S thereunder, or (2) who, prior to June 19, 1951, had his induction postponed under section 6 (i) (2) of the Selective Service Act of 1948, as amended, or was deferred as a student under section 6 (h) of such Act. A registrant who is placed in Class I-S under the provisions of this paragraph shall be retained in Class I-S (1) until the end of his academic year, or (2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier. The date of the classification in Class I-S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form No. 102) and be identified on that record as Class I-S (C).

• • • •

*1622.25 Class II-S: Registrant Deferred Because of Activity in Study.*—(a) In Class II-S shall be placed any registrant whose activity in study is found to be necessary to the maintenance of the national health, safety, or interest.

(b) A registrant's activity in study may be considered to be necessary to the maintenance of the national health, safety, or interest when any of the following conditions exist:

(1) The registrant (i) was accepted on or before July 1, 1951, for admission by a graduate school to

the class next commencing for a full-time course of instruction as a candidate for a graduate degree and, if such class has commenced, has entered upon such course, or (ii) is a graduate student seeking a graduate degree and is pursuing a full-time course of instruction in a graduate school to which he was admitted on or before July 1, 1951, and (iii) the graduate school at which he is in attendance has certified that he currently is meeting degree requirements and is expected to attain his degree.

(2) The registrant (i) was accepted on or before July 1, 1951, for admission by a professional school of medicine, dentistry, veterinary medicine, osteopathy, optometry, pharmacy, chiropractic, or chiropody to the class next commencing and, if such class has commenced, has entered such school, or (ii) is a student in any such professional school to which he was admitted on or before July 1, 1951, and (iii) the school at which he is in attendance has certified that he is satisfactorily pursuing a full-time course of instruction leading to his graduation.

(3) The registrant (i) has been accepted after July 1, 1951, for admission by a graduate school to the class next commencing for a full-time course of instruction as a candidate for a graduate degree and, if such class has commenced, has entered upon such course, and (ii) in his last full-time undergraduate academic year at a college, university, or similar institution of learning achieved a scholastic standing on that year's work which ranked him for that year within the upper one-half of the full-time male students in his class or has attained a score of 75 or more on the qualification test prescribed by the Director of Selective Service pursuant to paragraph (c) of this section, and (iii) the graduate school at which he is in attendance has certified that he currently is

meeting degree requirements and is expected to attain his degree.

(4) The registrant (i) has been accepted after July 1, 1951, for admission by a professional school of medicine, dentistry, veterinary medicine, osteopathy, optometry, pharmacy, chiropractic, or chiropody to the class next commencing and, if such class has commenced, has entered such school, and (ii) in his last full-time academic year at a college, university, or similar institution of learning prior to his entrance into such professional school achieved a scholastic standing on that year's work which ranked him for that year within the upper one-half of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and (iii) the school at which he is in attendance has certified that he is satisfactorily pursuing a full-time course of instruction leading to his graduation.

(5) The registrant has been pursuing a course of instruction which requires the completion of either five, six, or seven years of full-time undergraduate study to qualify him for the first academic degree and has successfully completed his fourth, fifth, or sixth year, as the case may be, at a college, university, or similar institution of learning and in his last completed undergraduate year achieved a scholastic standing on that year's work which ranked him for that year within the upper three-fourths of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has been accepted for admission by a college, university, or similar institution of learning to the fifth-year, sixth-year, or seventh-year class next commencing for a full-time course of instruction or has entered upon and is satisfactorily pursuing such course.

(6) The registrant has successfully completed his third year at a college, university, or similar institution of learning and achieved a scholastic standing on his third year's work which ranked him for that year within the upper three-fourths of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has accepted for admission by a college, university, or similar institution of learning to the fourth-year class next commencing for a full-time course of instruction or has entered upon and is satisfactorily pursuing such course.

(7) The registrant has successfully completed his second year at a college, university, or similar institution of learning and achieved a scholastic standing on his second year's work which ranked him for that year within the upper two-thirds of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has been accepted for admission by a college, university, or similar institution of learning to the third-year class next comemncing for a full-time course of instruction or has entered upon and is satisfactorily pursuing such course.

(8) The registrant has successfully completed his first year at a college, university, or similar institution of learning and achieved a scholastic standing on his first year's work which ranked him for that year within the upper one-half of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has been accepted for admission by a college, university, or similar institution of learning to the second-year class next commencing for a full-time course of instruction

or has entered upon and is satisfactorily pursuing such course.

(c) The Director of Selective Service is authorized to prescribe such qualification test or tests as he may deem necessary for carrying out the provisions of paragraph (b) of this section and to prescribe the procedures for the administration of such test or tests, for the certification of the results thereof, and for the certification of any other information required in carrying out the provisions of paragraph (b).

---

## APPENDIX E

### Local Board Memorandum No. 38

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
Washington 25, D. C.

LOCAL BOARD MEMORANDUM No. 38

ISSUED: OCTOBER 30, 1951.

AS AMENDED: SEPTEMBER 1, 1954.

SUBJECT: EXTENDED LIABILITY TO AGE 35 OF DEFERRED REGISTRANTS.

1. *Extension of Liability.*—Section 6 (h) of the Universal Military Training and Service Act, as amended June 19, 1951, provides that registrants who on June 19, 1951, were or may thereafter be deferred under the provisions of section 6 of that Act shall remain liable for training and service in the armed forces until the thirty-fifth anniversary of the date of their birth. Since the provisions of section 6 relate to both deferment and exemptions from training and service, the determination

of whether a classification authorized by that section is a deferment or an exemption must be based strictly on the statutory language of the section. Therefore, liability is extended to age thirty-five in any category only when the statutory language relating to such category specifically uses the word "deferred" or the word "deferment". When the statutory language relating to a category does not use the word "deferred" or the word "deferment" but uses any other words used as "exempt from training and service by induction", "No person • • • shall be liable for induction", or "relieved from liability" there is no deferment created which would extend liability beyond the age of twenty-six years.

*2. Liability Not Extended by Deferments Not Now Authorized by Law.*—Prior to June 19, 1951, section 6 required the deferment of conscientious objectors who were opposed to both combatant and noncombatant service in the armed forces and authorized the deferment of registrants who had wives with whom they maintained a bona fide family relationship in their homes. Section 6 was amended on June 19, 1951, by eliminating the provision requiring the deferment of conscientious objectors and by withdrawing from the President authority to provide for the deferment of registrants with wives alone, except in cases of extreme hardship. These two deferments, therefore, were not authorized by the law on and after June 19, 1951. Since the provisions of section 6 (h) extending liability to age thirty-five relate only to those "who are or may be deferred" under the provisions of section [illegible]r after June 19, 1951, the deferments which would result in such extension of liability are only those which were authorized by law on June 19, 1951. Registrants who on or after June 19, 1951, were deferred in Class IV-E, or in Class III-A solely because of having wives with whom they maintained a bona fide family relationship in their homes

(no hardship or other elements of dependency being involved), therefore, did not have their liability extended to age thirty-five.

*3. Deferments Which Extend Liability.*—(a) Except as otherwise provided in subparagraph (b) of this paragraph, local boards may consider that a classification, existing on or after June 19, 1951, and before the registrant has attained the age of twenty-six, in any of the following classes constitutes a deferment of the registrant under section 6 of the Act which extends his liability for training and service until he reaches the age of thirty-five:

(1) Class I-D under section 6 (c) (2) (A) of the Act and section 1622.13 (d) of the Selective Service Regulations providing for the deferment of members of the National Guard who enlisted at any time subsequent to February 1, 1951, before attaining the age of 18 years and 6 months upon the proclamation of the Governor of the State.

(2) Class I-D under section 6 (d) (1) of the Act and section 1622.13 (e) of the regulations providing for the deferment of members of the Reserve Officers' Training Corps and other officer training programs.

(3) Class I-D under section 6 (e) of the Act and section 1622.13 (g) of the regulations providing for the deferment of accepted aviation cadet applicants.

(4) Class I-S under section 6 (i) of the Act and section 1622.15 of the regulations requiring the deferment of certain high school and college students.

(5) Class II-A under section 6 (h) of the Act and section 1622.22 of the regulations providing for occupational deferment.

(6) Class II-C under section 6 (h) of the Act and section 1622.24 of the regulations providing for deferment because of agricultural occupation.

(7) Class II-S under section 6 (h) of the Act and section 1622.25 of the regulations providing for the occupational deferment of college students. Also included are Class II-A (S) deferments made under the former provisions of the regulations.

(8) Class III-A under section 6 (h) of the Act and section 1622.30 of the regulations providing for the deferment of registrants maintaining a bona fide family relationship in their homes with their children or because of extreme hardship and privation to dependents. This does not include any Class II-A deferments made under the former provisions of the regulations solely by reason of the registrant having a wife alone. (See paragraph 4(f) of this memorandum.)

(9) Class IV-B under section 6 (f) of the Act and section 1622.41 of the regulations providing for the deferment of certain officials.

(10) Class IV-F under section 6 (h) of the Act and section 1622.44 of the regulations providing for the deferment of registrants who are physically, mentally, or morally deficient or defective.

(b) A registrant must have liability for induction in order for that liability to be extended by his deferment. Liability cannot be extended when the registrant was never liable for induction. When a registrant on and after June 19, 1951, and prior to his attaining the age of twenty-six, was always entitled without question to be placed in a class exempt from liability under the law, his liability will not be extended to the age of thirty-five if he has been placed in a deferred class solely be-

cause that class was lower than the exempt class in the order of consideration of classes prescribed in section 1623.2 of the regulations.

*4. Classifications Which Do Not Constitute Deferments Under Section 6.*—The classification of a registrant in any of the following classes does not constitute a deferment under section 6 of the Act:

(a) Class I-C under sections 6 (a) and 6 (b) (4) of the Act and section 1622.12 of the regulations relating to exemption of persons on active duty in the armed forces or separated therefrom.

(b) Class I-D under section 6 (b) (2) of the Act and section 1622.13 (a) of the regulations relating to exemption of veterans who have ninety days or more but less than twelve months of service and who are members of reserve components.

(c) Class I-D under section 6 (c) (1) of the Act and section 1622.13 (c) of the regulations relating to exemption of registrants who on February 1, 1951, were members of organized units of the reserve components including the National Guard.

(d) Class I-D under section 4 (c) (2) of the Act and section 1622.13 (f) of the regulations providing for the deferment of enlisted reservists whose applications for active duty have been denied.

(e) Class I-D under section 6 (a) of the Act and section 1622.13 (h) of the regulations relating to exemption of students enrolled in an officer procurement program of certain military colleges.

(f) Class III-A under the former provisions of the law and regulations when the deferment was solely by reason of the registrant having a wife with whom he maintained a bona fide family relationship in their home *and no hardship or other elements of dependency were involved.*

(g) Class IV-A under sections 6 (b) (1) and 6 (b) (3) of the Act and subparagraphs (1), (2), and (3) of section 1622.40 (a) of the regulations relating to the exemption of veterans and registrants discharged after 3 years or more of service.

(h) Class IV-A under section 6 (o) of the Act and section 1622.40 (a) (4) of the regulations relating to the exemption of sole surviving sons.

(i) Class IV-C under section 4 (a) of the Act and section 1622.42 of the regulations relating to the exemption of aliens.

(j) Class IV-D under section 6 (g) of the Act and section 1622.43 of the regulations relating to exemption of ministers of religion and divinity students.

(k) Class IV-E under former provisions of the law and regulations providing for deferment of conscientious objectors opposed to both combatant and noncombatant military service.

(l) Class V-A under section 4 (a) of the Act and section 1622.50 of the regulations because over the age of liability for military service.

LEWIS B. HERSHEY.
Director.

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 16 |
| Appendix | 17 |


## CITATIONS


*Cases:*

| | |
|---|---|
| *Gonzales* v. *United States*, 348 U.S. 407 | 14, 15 |
| *Lancaster* v. *United States*, 153 F. 2d 718 | 15 |
| *Leon Keyser, Inc., Petition of*, 97 N.H. 404 | 9 |
| *Simmons* v. *United States*, 348 U.S. 397 | 14 |
| *State ex. Inf. Ellis* v. *Ferguson*, 333 Mo. 1177, certiorari denied, 291 U.S. 682 | 9 |
| *Supreme Forest Woodmen Circle* v. *City of Belton, Texas*, 100 F. 2d 655 | 9 |
| *Talcott* v. *Reed*, 217 F. 2d 360 | 15 |

*Statutes and Regulations:*

| | |
|---|---|
| The Universal Military Training and Service Act, 62 Stat. 604, as amended: | |
| Section 4(a), 50 U.S.C. 454(a) | 17 |
| Section 6(h), 50 U.S.C. 456(h) | 11, 18 |
| Section 10(b)(3), 50 U.S.C. 460(b)(3) | 9, 10, 18 |
| 32 C.F.R., 1954 Revision: | |
| Section 1604.51 | 20 |
| Section 1604.52 | 10, 20 |
| Section 1622.13 | 3 |
| Section 1622.15 | 21 |
| Section 1622.25 | 22 |
| Section 1622.50 | 26 |
| Section 1624.1 | 27 |
| Section 1624.2 | 15, 28 |

*Miscellaneous:*

| | |
|---|---|
| H. Conference Report No. 535, May 31, 1951, 82nd Cong., 1st Sess., p. 20 | 13 |
| H. Rep. No. 271, March 15, 1951, 82nd Cong., 1st Sess., 1951, p. 34 | 12 |
| S. Rep. No. 1268, May 12, 1948, 80th Cong., 2nd Sess., p. 18 | 9 |

# In the Supreme Court of the United States

OCTOBER TERM, 1955

---

No. 513

UNITED STATES OF AMERICA, EX REL. JUSTIN K. McCARTHY, PETITIONER

*v.*

HAROLD H. COOK, LT. COL., U. S. A., COMMANDING OFFICER, UNITED STATES ARMY AND AIR FORCE INDUCTION CENTER, SCHUYLKILL ARSENAL, PHILADELPHIA, PA., AND ROBERT T. STEVENS, SECRETARY OF THE ARMY.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

---

**OPINION BELOW**

The opinion of the Court of Appeals (Pet. 65-80) is reported at 225 F. 2d 71.

**JURISDICTION**

The judgment of the Court of Appeals was entered on May 23, 1955 (Pet. 81), and a petition for

* The present Secretary of the Army is Wilber M. Brucker.

rehearing was denied on August 15, 1955 (Pet. 82). The petition for a writ of certiorari was filed on November 11, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether a local selective service board covering a small city located in two counties of Pennsylvania had jurisdiction to classify registrants.

2. Whether petitioner was liable, under Section 6(h) of the Universal Military Training and Service Act, for induction up to age 35, as a person previously deferred, where he was classified II-S (student deferment) and later I-A shortly before reaching age 26, after which his induction was postponed until he had completed his education and passed his bar examinations.

3. Whether delay in granting petitioner a personal appearance before the local board to argue for a II-S classification prejudiced him, where prior to the personal appearance he enjoyed what was in effect a continuous II-S classification, allowing time for completion of his education before induction.

## STATUTES AND REGULATIONS INVOLVED

Sections 4(a), 6(h) and 10(b)(3) of the Universal Military Training and Service Act, and the pertinent Selective Service Regulations are set forth in the Appendix, *infra*, pp. 17-29.

## STATEMENT

On November 23, 1954, petitioner was inducted into the Army pursuant to the Universal Military

Training and Service Act, as amended (R. 28-29).[1] On that same day he filed a petition in the United States District Court for the Eastern District of Pennsylvania for a writ of habeas corpus seeking release from the service. A return was filed, and a hearing was held (R. 1, 2-3) at which petitioner and three members of his local draft board testified (R. 4-84). The District Court denied the petition (R. 85), and the Court of Appeals unanimously affirmed (Pet. 81).

The facts may be summarized as follows:

Petitioner was born in Bethlehem, Pennsylvania, on August 28, 1927. He registered for Selective Service on September 10, 1948, with Local Board Number 114, Northampton County, Pennsylvania. (R. 4, 5.) In the classification questionnaire, filed on July 6, 1949, he stated that he had been a member of the Naval Reserve since August 5, 1948, and had prior service in the Naval Reserve from August 13, 1945, to January 31, 1947, when he was honorably discharged (R. 59). On August 11, 1949, the local board classified him in Class I-D (R. 5, 30-31).[2]

---

[1] This Act is the amended version of the Selective Service Act of 1948. 62 Stat. 604. The amendatory Act of June 19, 1951, 65 Stat. 75, supplied the new title cited above.

[2] Section 6(c) of the Act, as originally enacted on June 24, 1948, and as amended on June 19, 1951, and the applicable Selective Service Regulations [32 C. F. R. 1622.13 (c)] provide that registrants who were members of the Naval Reserve on June 24, 1948, or February 1, 1951, may properly be classified in Class I-D and exempted from training and service by induction under the Act only if they are members

On February 4, 1952, while petitioner was in his second year at Columbia University Law School, he received a Form 110 notifying him that the local board had classified him in Class I-A (R. 5, 31-32). On February 9, 1952, he wrote his board stating that he expected to receive his law degree from Columbia in June, 1953, appealing his I-A classification, and requesting that he "be afforded the opportunity of appearing in person before your Board, Number 114" (R. 6, 32-33). The Board did not respond to this letter, but shortly thereafter petitioner received carbon copies of Form 109, the original of which had been sent by the registrars of Lehigh and Columbia to advise the local board that petitioner was a student (R. 33.). On February 11, 1952, a letter from the Assistant Dean of Columbia University Law School stated that petitioner was a student and urged that he be given a student's II-S deferment (R. 34).

On February 27, 1952, petitioner received a Form 110 notice of a II-S classification "until 6-52". He did not appeal from this classification (R. 6, 34, 36). He was subsequently given a second II-S classification "until 6-53" (R. 7, 36-37).

On May 28, 1953, the local board classified petitioner I-A (R. 7, 37). On June 1, 1953, petitioner

---

of organized units and are satisfactorily participating in scheduled drills and training periods as prescribed by the Secretary of Defense. The petitioner was not a member of an organized unit and did not participate in any scheduled drills. Nevertheless, he retained the I-D classification in which the local board, undoubtedly through inadvertence, had classified him through 1950 and 1951 (R. 31).

wrote the board saying that he would not be eligible for his law degree from Columbia until October, 1953, and asking what procedure he should follow to preserve his student classification until he could receive the degree (R. 7, 38-39). The board did not answer this letter, but on June 17 sent petitioner an order to report for induction on July 9, 1953 (R. 10, 39). On June 22, 1953, petitioner wrote the board requesting postponement of induction so that he could complete the credits necessary for obtaining his degree (R. 44-46). On June 30, petitioner received notice that his induction had been postponed until August 30, 1953 (R. 42-43).

On July 6, 1953, while petitioner was attending summer school in Wisconsin, he wrote a lengthy letter asking that the board reopen and consider his case. He claimed that he had received improper advice from the Government Appeal Agent; that he had been denied the right to appear before the local board in person; that he was arbitrarily classified I-A without a reasonable delay to hear from Columbia University; and that the board was without jurisdiction. In requesting an opportunity to make a personal appearance, petitioner asked for restoration of his II-S, or for a I-S, classification. In concluding, he stated that if these rights were denied, he was then appealing from the board's denial. (R. 39-41, 8-9.) Since the board did not reply to the letter of July 6, petitioner wrote on August 18, 1953, stating that he was appealing any definitive action by the board, and again requested

a personal appearance (R. 12, 43). On August 28, 1953, petitioner reached the age of 26 (R. 8).

On September 1, 1953, petitioner was notified that, by authority of the State Director, his induction was postponed "indefinitely" (R. 13, 46). On September 16, 1953, petitioner wrote the board, stating that he had been trying for two months to have his case reopened, and contending that he had never been legally classified since his registration on September 10, 1948 (R. 14). In October 1953 petitioner received his law degree from Columbia University, and in November 1953 was admitted to the District of Columbia Bar (R. 29).

On November 20, 1953, petitioner was classified I-A by the appeal board (R. 46). On November 30, 1953, he wrote to the State Director, complaining that he had been denied the right of a personal appearance before any selective service board to discuss his case (R. 47). On January 7, 1954, petitioner received a notice to appear for a hearing before the local board on January 12, 1954 (R. 48, 15). On January 9, he wrote to the board, requesting the answers to eight questions, and declaring that unequivocal answers to his questions were required before he could adequately discuss his reasons for reclassification (R. 48-50, 15-16). On January 11 the local board wrote petitioner requesting that he appear on January 12, 1954, at which time he would be given "an opportunity to discuss [his] case in full with the Local Board" (R. 16, 51). Petitioner, who was taking a bar review course in Philadelphia, wired the board

for a postponement of this hearing, and his request was granted (R. 16-17).

On January 19, 1954, petitioner wrote the board, reviewing his case and stating that he had never waived any of his rights (R. 17). A reply of January 22 referred to the fact that petitioner's file was at State Headquarters (R. 18). On May 3, 1954, State Headquarters, acknowledging several previous letters, wrote petitioner that the local board had jurisdiction and that petitioner was entitled to a personal appearance (R. 19-20.)

Petitioner appeared before the local board on May 17, 1954. All three board members were present. Petitioner challenged the jurisdiction and composition of the board, and introduced a written statement which summarized his position and gave a history of the case. (R. 20-24.) On May 18, petitioner received a notice that he had been classified I-A by the local board. He appealed, and in October, 1954, was classified I-A by the appeal board (R. 26, 56). He applied unsuccessfully for a presidential appeal from his classification (R. 27-28). He was inducted into the army under protest on November 23, 1954 (R. 28-29).

Regarding the composition of the local board, it was agreed that the chairman, Mr. Thevenet, was at all relevant times a bona fide resident of Northampton County (83-84). Mr. Bilheimer testified that he had been appointed a board member on August 13, 1948, that he lived in Bethlehem in Lehigh County, and that he had resided in Lehigh County at all times when he was a board member

(R. 60-61). Mr. Hanners, a board member from August 13, 1948, until June 19, 1953 (R. 74), had resided in Bucks County since 1948 (R. 63), but he owned a news agency in nearby Bethlehem and had numerous friends there (R. 78). Mr. Collie testified that he had been appointed to the board on June 19, 1953; that he lived in Bethlehem in Lehigh County, where he had been a resident during all of the time he was a board member; and that he worked for a publishing company in Bethlehem in Northampton County (R. 80-82).

It was stipulated that Local Board Number 114 covered the City of Bethlehem, which included wards in Lehigh and Northampton counties. Wards 10 through 13 were located in Lehigh County, and wards 1 through 9 and 14 through 17 in Northampton County. (R. 84, 82-83). There were three other local boards in Northampton County and three in Lehigh County (R. 84). The population in 1940 was approximately 58,000 for the City of Bethlehem, 180,000 for Lehigh County, and 165,000 for Northampton County (R. 83).

## ARGUMENT

As petitioner observes (Pet. 5), he is not a minister or a conscientious objector, and he has no physical infirmities warranting relief from military service. He now seeks, nevertheless, to avoid altogether the selective service obligations which were deferred, at his request, for the years during which he completed his legal education and was examined for admission to the bar. The technical argu-

ments on which the lengthy petition seeks this result are unsubstantial, and there is no conflict or other basis for certiorari.

1. Petitioner contends that Local Board 114, with which he dealt at such length while his induction was postponed and his legal education completed, was not legally constituted, since its jurisdiction was not limited to one county and the board members did not reside in one county (Pet. 29-36).

Under Section 10(b)(3) of the Act (*infra*, p. 18) the President is directed to set up at least one local board in "each county or political subdivision corresponding thereto". Regulation 1604.51 (*infra*, p. 20) provides that, normally, no local board area shall have "a population exceeding 100,000".[3] The small City of Bethlehem—obviously a reasonable and appropriate area for local board jurisdiction—is a "political subdivision corresponding" to a county, even though it lies athwart two counties (cf. *Supreme Forest Woodmen Circle* v. *City of Belton, Texas*, 100 F. 2d 655, 657 (C.A. 5); *Petition of Leon Keyser, Inc.*, 97 N.H. 404, 410; *State ex Inf. Ellis* v. *Ferguson*, 333 Mo. 1177, 1182, certorari denied, 291 U.S. 682). Its population is 58,000 (R. 83), well below the 100,000 maximum the regula-

[3] As the court below observed (Pet. 77), Local Board 114 was not an intercounty board; it functioned in a densely populated area. See S. Rep. No. 1268, May 12, 1948, 80th Cong., 2nd Sess., p. 18, where this language appears concerning Section 10(b)(3): "The provision in this bill for intercounty local boards is a new one, and is intended to provide for more efficient operation in the less densely populated areas."

tions prescribe. Accordingly, Local Board 114 covered a jurisdictional area within the purview of the statute and the regulations, neither of which requires that a local board's area be strictly confined within county lines, as petitioner contends.

The residential requirements as to members were also fulfilled to give the local board necessary jurisdiction to act in petitioner's case. Section 10(b)(3) provides that local board members shall be residents in "the county or political subdivision corresponding thereto in which such local board has jurisdiction"; and Regulation 1604.52(c) (*infra*, p. 21) states that they shall be residents "of a county in which their local board has jurisdiction, and * * * shall also, if at all practicable, be residents of the area in which their local board has jurisdiction." At the time of the crucial I-A local board classification of May 17, 1954 (R. 55), which eventually resulted in petitioner's induction subsequent to his personal appearance, all three local board members met the residence requirements as residents of the political subdivision, namely the City of Bethlehem, and of the corresponding parts of the two counties of Northampton and Lehigh in which the board had jurisdiction.

The holding of the court below, that Local Board 114 had jurisdiction over an authorized area and was composed of qualified residents, was thus correct. Petitioner was properly classified by a duly constituted local board composed of fellow residents of his home town, and was inducted for

military service for which he was plainly qualified and obligated.[4]

2. Petitioner became 26 on August 28, 1953, after he had been classified I-A and had already been notified, in response to his request, that his induction would be postponed to August 30. (See Statement, *supra*, pp. 5, 6). He now contends (Pet. 40-52) that, since his II-S (student deferment) classification had been changed to I-A prior to his 26th birthday, he was not subject to extended liability for service until he reached the age of 35 but was entitled to a V-A (over-age) classification after he became 26, even though his induction was in fact postponed to enable him to complete his studies. The argument rests upon a misreading of Section 6(h) of the Universal Military Training and Service Act (*infra*, p. 18).

Under Section 6(h), "persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National

[4] Petitioner makes a related argument that the court below, in conflict with certain decisions, erroneously held that the denial of his rights to procedural due process, by being subjected to the authority of a local board without jurisdiction, was cured by a *de novo* appeal board classification. This is said to result from the last paragraph (Pet. 80) of the court's opinion, to the effect that the appeal board's decision amounted to a new classification (Pet. 36-39). It is not entirely clear what the court meant by this statement in this context. But since the court had properly and unequivocally held that the local board had jurisdiction of petitioner's case, it is not necessary to reach any question as to the effect of the appeal board's decision if the local board had been improperly constituted.

Security Training Corps under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth." There is nothing in this language to support petitioner's view that a deferment classification must be in effect at the moment the registrant becomes 26 in order to extend his liability for service (Pet. 41). To the contrary, it is clear that any registrant who receives and educational deferment thereby has his liability for service extended.[5] Since petitioner had twice received a II-S classification to enable him to complete his law school education, he was liable to service until he reached 35, regardless of his status at the age of 26.

Petitioner erroneously relies upon the following excerpt from H. Rep. No. 271, March 15, 1951, 82nd Cong., 1st Sess., p. 34:

> Likewise, it should be observed that the new section permits the induction of persons now or hereafter deferred until the thirty-fifth anniversary of their birth should their basis for deferment terminate after passing their twenty-sixth birthday. This will prevent persons now deferred from escaping induction by continuing their education past the twenty-sixth anniversary of their birth.

[5] On petitioner's contrary view, a registrant who enjoys a student deferment until shortly before he reaches age 26, and then is properly classified I-A, readily escapes service altogether if his induction is postponed beyond his 26th birthday—which is, of course, what petitioner seeks. The quaint result would be to transform the benefit of deferment into an outright exemption, the precise result Congress sought to avoid in Section 6(h).

This report does not purport to limit Section 6 to those persons deferred until after 26; it merely makes it clear that those who are deferred beyond 26 will not escape induction. The report certainly does not qualify the plain meaning of the statutory language.[6]

Even on petitioner's interpretation, however, he is within the statute. He clearly had a deferment from induction for educational purposes at the time he reached 26 in August, 1953. It is not of controlling importance that he was classified I-A instead of in a technically deferred II-S status at the time he reached age 26. Deferment from induction as a matter of fact, rather than presence of a technical deferment classification, would be determinative. The court below wisely placed substance above form in recognizing that petitioner "was certainly deferred within the meaning of Section 6 of the Act" (Pet. 76), since after the board changed the II-S classification to I-A, it obligingly continued to postpone induction at petitioner's request to allow him ample time within which to graduate from law school and to pass his bar examinations.

If the local board had followed what petitioner insists was the only proper procedure, *i.e.*, to continue the II-S classification until he reached 26 (Pet. 42, 45), he would have been in no better position. Under his own argument, he would have

[6] See also House Conference Report No. 535, May 31, 1951, 82nd Cong., 1st Sess., p. 20: "Persons now or hereafter deferred from induction will remain liable for induction into the Armed Forces or the National Security Training Corps until they attain the age of 35."

been properly subject to extended liability for service until age 35.

3. Petitioner's contention (Pet. 52-60) that the original denial of a personal appearance was not cured by delaying his induction and holding a hearing after the cause for deferment as a student had ceased to exist, would mean that a local board could never cure its own errors in procedure. The argument is frivolous.

It is clear that petitioner's primary reason for wanting a personal appearance before the local board was to retain his II-S student classification until he finished law school and passed his bar examinations. This result he successfully attained, even though after May 28, 1953, he was placed in I-A and subsequently obtained postponements of his induction.[7] The court below was correct, therefore in deciding that petitioner had "failed to show that he was prejudiced in any way by the failure of the board to grant him a hearing in 1952" (Pet. 75).

This holding is not out of harmony with *Simmons* v. *United States,* 348 U.S. 397, and *Gonzales* v. *United States,* 348 U.S. 407, as petitioner asserts (Pet. 55-56). The issues in those cases were entirely different from that involved here. In *Simmons,* the registrant was not required to prove specific prejudice by reason of not being furnished a

---

[7] If, on the other hand, petitioner had actually been inducted before completion of his legal education without having been granted a requested personal appearance to argue for a II-S classification, the case would be entirely different, and he would have had valid reason for complaint.

fair résumé of the FBI report, since without access to such a résumé he could not know in what particular manner failure to furnish it to him would result in prejudice. The same reasoning applies to failure in *Gonzales* to give the registrant a copy of the recommendation of the Department of Justice to the appeal board. In the instant case, on the other hand, there is no suggestion or basis for suggesting that information capable of prejudicing petitioner was withheld from him. Even if, prior to completion of his studies and bar examinations, he had made a personal appearance before the local board and discussed the propriety of a II-S classification, the board could not have given him a more advantageous position than he enjoyed, *i.e.*, actual freedom from induction until completion of his studies and examinations. Cf. *Lancaster* v. *United States*, 153 F. 2d 718, 720 (C.A. 1).

This is not a case where a registrant was completely deprived of the opportunity of a personal appearance before the local board.[8] Petitioner made such an appearance to present his version of the case on May 17, 1954 (R. 20-24).[9] It is true that

---

[8] *Talcott* v. *Reed*, 217 F. 2d 360 (C.A. 9), is not in conflict with the decision below (see Pet. 61). There, the registrant was never afforded a personal appearance before the local board. The case was concerned primarily with whether a letter from the registrant constituted a waiver of his right to such a personal appearance.

[9] Petitioner advances the argument that this was a preclassification hearing instead of a personal appearance under Regulation 1624.2 (*infra*, p. 28), since no local board I-A classification was then outstanding (Pet. 61). It is clear, however, that the local board conducted this hearing,

by that time petitioner could not successfully request a II-S classification; but that was because he had already obtained that which his request for appearance sought—completion of his legal education.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*
WARREN OLNEY III,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
*Attorneys.*

DECEMBER, 1955.

---

not as one for preclassification, but with the understanding that a I-A classification was then in effect and was being attacked by petitioner. The appeal board had classified petitioner I-A on November 20, 1953 (R. 46). Moreover, the letter of May 3, 1954, from State Headquarters mentioned that petitioner was entitled under his letter of July 6, 1953 (at which time petitioner was in I-A as a result of the local board's classification on May 28, 1953), to a personal appearance under "Part 1624 of the Regulations", and suggested to the local board that he be given such a hearing (R. 19-20).

APPENDIX

The Universal Military Training and Service Act, 62 Stat. 604, as amended, provides:

Section 4(a), 50 U.S.C. App. 454(a):

> Except as otherwise provided in this title, every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title, or who is otherwise liable as provided in section 6(h) of this title, shall be liable for training and service in the Armed Forces of the United States: *Provided,* That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: * * *
>
> * * * * *
>
> No person, without his consent, shall be inducted for training and service in the Armed Forces or for training in the National Security Training Corps under this title, except as otherwise provided herein, after he has attained the twenty-sixth anniversary of the day of his birth.

Section 6(h), 50 U.S.C. App. 456(h):

The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service * * * of any and all categories of persons * * * whose activity in study * * * is found to be necessary to the national health, safety, or interest: * * * *Provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National Security Training Corps under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. * * *

Section 10(b)(3), 50 U.S.C. App. 460(b)(3):

The President is authorized—

* * * * *

(3) to create and establish within the Selective Service System civilian local boards, * * *. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials: *Provided*, That an intercounty local board consisting of

at least one member from each component county or corresponding subdivision may be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State or comparable jurisdiction when the President determines, after considering the public interest involved and the recommendation of the governor or comparable executive official or officials, that the establishment of such local board area will result in a more efficient and economical operation. Any such intercounty local board shall have within its area the same power and jurisdiction as a local board has in its area. No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or

claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * *

Selective Service Regulations appearing in 32 C.F.R., 1954 Revision, provide as follows:

Section 1604.51: *Areas.* The State Director of Selective Service for each State shall divide his State into local board areas. Normally, no such area should have a population exceeding 100,000. There shall be at least one separate local board area in each county; provided, that an intercounty local board may be established for an area not exceeding five counties within a State when the Director of Selective Service determines, after considering the public interest involved and the recommendation of the Governor, that the establishment of such local board area will result in a more efficient and economical operation.

Section 1604.52: *Composition and appointment.* (a) A local board of three or more members shall be appointed for each local board area by the President upon recommendation of the Governor.

(b) A local board of three or more members, with at least one member from each

county included within the intercounty local board area, shall be appointed for each intercounty local board area by the President upon recommendation of the Governor.

(c) The members of local boards shall be male citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age.

Section 1622.15: *Class I-S: Student deferred by statute.* * * *

(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I-S under the provisions of this paragraph (1) who has previously been placed in Class I-S thereunder, or (2) who, prior to June 19, 1951, had his induction postponed under section 6(i)(2) of the Selective Service Act of 1948, as amended, or was deferred as a student under section 6 (h) of such act. A registrant who is placed in Class I-S under the provisions of this para-

graph shall be retained in Class I-S until the end of his academic year, or (2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier. The date of the classification in Class I-S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form No. 102) and be identified on that record as Class I-S (C).

Section 1622.25: *Class II-S: Registrant deferred because of activity in study.*

(a) In Class II-S shall be placed any registrant whose activity in study is found to be necessary to the maintenance of the national health, safety, or interest.

(b) A registrant's activity in study may be considered to be necessary to the maintenance of the national health, safety, or interest when any of the following conditions exist:

(1) The registrant (i) was accepted on or before July 1, 1951, for admission by a graduate school to the class next commencing for a full-time course of instruction as a candidate for a graduate degree and, if such class has commenced, has entered upon such course, or (ii) is a graduate student seeking a graduate degree and is pursuing a full-time course of instruction in a graduate school to which he was admitted on or before July 1, 1951, and (iii) the graduate school at which he is in attendance has certified that he currently is

meeting degree requirements and is expected to attain his degree.

* * * * *

(3) (i) The registrant has been accepted after July 1, 1951, for admission by a graduate school to a class commencing before January 1, 1955, and which is the first such class commencing after the date of his acceptance, for a full-time course of instruction as a candidate for a graduate degree and, if such class has commenced, has entered upon such course before January 1, 1955, and (ii) the registrant in his last full-time undergraduate academic year at a college, university, or similar institution of learning achieved a scholastic standing on that year's work which ranked him for that year within the upper one-half of the full-time male students in his class or has attained a score of 75 or more on the qualification test prescribed by the Director of Selective Service pursuant to paragraph (c) of this section, and (iii) the graduate school at which the registrant is in attendance has certified that he currently is meeting degree requirements and is expected to attain his degree.

* * * * *

(5) (i) The registrant has been accepted for admission by a graduate school to a class commencing on or after January 1, 1955, and which is the first such class commencing after

the date he has completed the requirements for admission, for a full-time course of instruction as a candidate for a graduate degree and, if such class has commenced, has entered upon such course, and (ii) the registrant in his last full-time undergraduate academic year at a college, university, or similar institution of learning achieved a scholastic standing on that year's work which ranked him for that year within the upper one-fourth of the full-time male students in his class or has attained a score of 80 or more on the qualification test referred to in subparagraph (3) of this paragraph and (iii) the graduate school at which the registrant is in attendance has certified that he currently is meeting degree requirements and is expected to attain his degree.

(6) The registrant has been pursuing a course of instruction which requires the completion of either five, six, or seven years of full-time undergraduate study to qualify him for the first academic degree and has successfully completed his fourth, fifth, or sixth year, as the case may be, at a college, university or similar institution of learning and in his last completed undergraduate year achieved a scholastic standing on that year's work which ranked him for that year within the upper three-fourths of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has been accepted for admission by a college, uni-

versity, or similar institution of learning to the fifth-year, sixth-year, or seventh-year class next commencing for a full-time course of instruction or has entered upon and is satisfactorily pursuing such course.

(7) The registrant has successfully completed his third year at a college, university, or similar institution of learning and achieved a scholastic standing on his third year's work which ranked him for that year within the upper three-fourths of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has been accepted for admission by a college, university, or similar institution of learning to the fourth-year class next commencing for a full-time course of instruction or has entered upon and is satisfactorily pursuing such course.

(8) The registrant has successfully completed his second year at a college, university, or similar institution of learning and achieved a scholastic standing on his second year's work which ranked him for that year within the upper two-thirds of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has been accepted for admission by a college, university, or similar institution of learning to the third-year class next commencing for a full-time course of instruction or has entered

upon and is satisfactorily pursuing such course.

(9) The registrant has successfully completed his first year at a college, university, or similar institution of learning and achieved a scholastic standing on his first year's work which ranked him for that year within the upper one-half of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in subparagraph (3) of this paragraph, and has been accepted for admission by a college, university, or similar institution of learning to the second-year class next commencing for a full-time course of instruction or has entered upon and is satisfactorily pursuing such course.

(c) The Director of Selective Service is authorized to prescribe such qualification test or tests as he may deem necessary for carrying out the provisions of paragraph (b) of this section and to prescribe the procedures for the administration of such test or tests, for the certification of the results thereof, and for the certification of any other information required in carrying out the provisions of paragraph (b).

Section 1622.50: *Class V-A: Registrant over the age of liability for military service.*

(a) In Class V-A shall be placed every registrant who has attained the twenty-sixth anniversary of the day of his birth except (1) those registrants who are in active military

service in the armed forces and are in Class I-C, (2) those registrants who are performing civilian work contributing to the maintenance of the national health, safety, or interest in accordance with the order of the local board and are in Class I-W, (3) those registrants who have consented to induction, and (4) those registrants who on June 19, 1951, or at any time thereafter, were deferred under the provisions of section 6 of title I of the Universal Military Training and Service Act, as amended. Except as is otherwise provided in this paragraph, registrants who prior to attaining the twenty-sixth anniversary of the day of their birth have been classified in some other class shall, as soon as practicable after attaining the twenty-sixth anniversary of the day of their birth, be reclassified into Class V-A.

* * * * *

Section 1624.1: *Opportunity to appear in person.*

(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form

No. 110) to him. Such 10-day period may not be extended.

* * * * *

Section 1624.2: *Appearance before local board.*

(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the "Minutes of Actions of Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may

have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, or determines not to reopen the registrant's classification, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 366736 710

## INDEX OF AUTHORITIES CITED


PAGE

Selective Service Regulations:

Section 1604.51 [32 C. F. R. § 1604.51] ..... 6

Section 1604.52 (c) [32 C. F. R. § 1604.52 (c)] ... 6

Section 1624.2 [32 C. F. R. § 1624.2] ..... 8

Universal Military Training and Service Act, 50 U. S. C. App. Sections 450, *et. seq.*:

Section 6 (h) [50 U. S. C. App. § 456 (h), 65 Stat. 53] . . ..... 7

Section 10 (b) (3) [50 U. S. C. App. § 460 (b) (3), 65 Stat. 87] ..... 5, 6

# Supreme Court of the United States

**OCTOBER TERM, 1955**

**No. 513**

---

UNITED STATES OF AMERICA, *ex rel.*
JUSTIN K. MCCARTHY,

*Petitioner,*

v.

HAROLD H. COOK, Lt. Col., U. S. A., Commanding Officer, United States Air Force, Induction Center, Schuylkill Arsenal, Philadelphia, Pa., and ROBERT T. STEVENS, Secretary of the Army,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

## REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

MAY IT PLEASE THE COURT:

Before taking up point by point the contentions in respondent's brief which deserve comment petitioner believes that a preliminary statement is in order.

This reply brief is submitted in order to point out significant omissions by the respondent in the questions involved and many important facts necessary to a proper consideration and disposition of the

essential questions presented. It is also intended to correct respondent's misinterpretation of what was decided by the court below.

At the outset it is important that this Court not be misled by respondent's unjustified suggestion (Br. p. 8) that petitioner is merely attempting to avoid his selective service obligations. Petitioner's conduct throughout his dealings with his local board has simply been an assertion of the rights to which he was entitled under the law and an attempt to obtain redress for the high-handed denial of those rights by the local board. Because of his insistence upon adherence to the law he is now unjustly accused of being a violator of the law himself. Few injuries cut more keenly into the marrow of human feeling than injustice. Resistance against injustice is so deeply rooted in the heart of man that when his sense of justice is outraged his whole nature rises in revolt. And when injustice wears the cloak of righteousness or the mask of patriotism, it cuts like a dagger piercing to the very bone. It is indeed sad that respondent should find it appropriate to characterize petitioner's insistence upon due process of law as an unpatriotic attempt to avoid service. It would have been easy for petitioner to acquiesce in the illegality and serve his statutory period in the Armed Forces. He has chosen instead the more difficult and truly patriotic course and has risked his entire fortune and honor in the "small City of Bethlehem" (Br. p. 9) in the cause of resistance to illegality which has ultimately brought him to this Court.

Petitioner challenges the over-all implication which respondent seeks to make in its brief, that the local

board gave petitioner a deferment at any time after May 28, 1953. The postponements of induction that were given were not deferments. Nor were they acts of generosity, as respondent would lead the Court to believe. They were grudingly given on the orders of the State and National Directors of Selective Service as the result of the denials of petitioner's procedural rights by the local board. By using the device of postponement rather than granting petitioner the deferment to which he was entitled under the law, the board kept him in a state of disturbing uncertainty, subject at all times to the whim of the local board. This produced a state of mind that made successful study difficult. This condition was precisely what Congress intended to avoid for students by establishing the statutory deferment. The respondent attempts to obscure this obvious violation of the law by the euphemism of equating "postponement" under a I-A classification with the statutory "deferment." It is not a matter of "technical deferment classification." (Br. p. 13) But it is a matter of substantial statutory right which was denied. The error of the respondent's argument can be clearly demonstrated by this analogy:— For instance, the Act provides for the exemption of ministers of religion. The respondent would have the Court believe that the denial of the ministerial exemption accompanied by a postponement of induction is equivalent to the granting of the statutory exemption. The result of respondent's entire argument is not only to blur but utterly to eliminate from the Act the careful Congressional distinction among exemption, deferment and postponement.

1. The attention of the Court is invited to the questions presented, stated on page 2 of the re-

spondent's brief. The questions presented by the respondent omit entirely the vital question number II appearing on page 3 of the petition. This question inheres in this case and will abide until decided. It is unjust to petitioner to conclude erroneously that the second question is not involved in this case. The respondent has also unjustly omitted question number IV appearing on page 3 of the petition.

2. While there are no affirmative misstatements in the respondent's statement of facts beginning on page 3 and ending on page 8, there are vital and crucial omissions of important facts. In the event that petitioner's case is considered upon the basis of the facts stated by the respondent, then petitioner will be seriously injured. A full statement of the facts necessary to a proper disposition of the questions raised appears in the petition at page 5 to page 27, and the Court is requested to read carefully and consider all of the facts there stated. Unless the Court does this, it will be unable to see clearly how petitioner was mistreated by his local board and deprived of vital constitutional procedural rights. The Court, moreover, will not appreciate how the questions arose unless petitioner's statement of facts, rather than respondent's, is considered as the basis for the disposition of this petition.

All of the omissions of important facts in the respondent's brief constitute the basis for the erroneous conclusion which appears at page 13 of respondent's brief. There the respondent states: ". . . it [the local board] obligingly continued to postpone induction at petitioner's request to allow him ample time within which to graduate from law school and to pass

his bar examinations." We challenge the correctness of this statement for the reasons heretofore stated in the preliminary statement to this brief.

On page 8 of the brief, respondent states that petitioner ". . . now seeks, nevertheless, to avoid altogether the selective service obligations . . ." We challenge the correctness of this statement. Complete avoidance of service could not result from a decision in petitioner's favor on four of the six questions stated in the petition. It could result only in the event that the Court decides in petitioner's favor on questions III and IV, stated in the petition at page 3.

3. The respondent on pages 9 to 11 of its brief wholly fails to meet the issue and answer the argument made by petitioner under point I at pages 29 to 36 of the petition. A specious and factitious conclusion is reached. The respondent in its argument at this point in the brief cuts out completely the critical qualifying statutory language "each county or political subdivision corresponding thereto of each state . . ." The respondent would have this Court believe that "corresponding thereto" does not refer to a county but refers to any political subdivision, such as a city, town, irrigation district, poor district, sanitary district, school district or borough. The respondent cites cases supporting the obvious proposition that a city is a political subdivision. The citation of these cases is unnecessary to prove this familiar point. It is not in dispute in this case that a city is a political subdivision. What is in dispute and what has not been answered by the respondent is whether a city lying in *two* counties is a political subdivision "corresponding to *a* county" within the meaning of Section 10 (b) (3) of the Act.

In order to make its sophistry appear respectable, the respondent relies upon the section of the regulations defining the population limits of a local board area, a matter which is not here in issue (32 C. F. R. § 1604.51) (see pages 9-10, 20 of the brief). This regulation does not relate to a local board area situated in two counties but is limited to an area within one county. The respondent cannot discard the statutory phrase, "political subdivision corresponding thereto" and substitute therefor a misinterpretation of Section 1604.51. Neither this section of the regulations, nor any other, relates to or purports to authorize the establishment of one local board area comprising parts of two counties.

On page 10 of the brief, argument is made about the residential requirements of board members in 32 C. F. R. § 1604.52 (c). Since it is plain that the position taken by respondent on Section 10 (b) (3) of the Act on page 9 falls, then the related argument in respect to 32 C. F. R. § 1604.52 (c) on page 10 must fall for the same reason.

4. The respondent takes the position that the conflict of decisions regarding the superseding effect of an appeal board classification relied upon by petitioner at pages 36 to 39 (based on question number II in the petition at page 3 and omitted by the respondent) does not exist in this case. The holding made by the court below that produced this conflict was an alternative holding in this case which cannot be eliminated from it merely by the device of relegating it to a footnote in respondent's brief. The court below expressly held as follows: "The Area Appeal Board denied his appeal. Such action by the

Appeal Board amounted to a new classification. See *United States* v. *Stiles,* 3 Cir., 169 F. 2d 455." (Pet. p. 80)

5. It is wholly unnecessary for petitioner even to answer the argument of the respondent about the proper interpretation of Section 6 (h) of the Universal Military Training and Service Act. The argument made by the respondent in an attempt to persuade this Court to deny the petition in this case (pages 11-14) shows, now more than ever, that the petition ought to be granted in this case on this ground. From a reading of the discussion at pages 40 to 52 of the petition and the brief of the respondent at pages 10 to 13, it becomes manifest that the statute is plainly susceptible of two conflicting interpretations. Since such an important statute is thus ambiguous it is imperative that this Court grant the writ and properly interpret the statute so as to resolve the ambiguity.

Respondent's argument at page 13 of its brief to the effect that petitioner's postponement of induction was equivalent to a deferment within the meaning of the law (Section 6 (h) of the Act) has already been answered in the preliminary statement contained in this reply.

6. Petitioner challenges respondent's argument which appears at pages 14 to 16 of its brief concerning the denial of a personal appearance before the local board. Respondent's argument is based on the same misconception with which it has been plagued from the very beginning. This is that petitioner was in effect deferred because his induction was postponed long enough for him to complete his legal education. This is no answer to the outrageous denial of pro-

cedural rights and flouting of the law by the local board, which cannot be glossed over by the use of the epithet "frivolous." (Br. p. 14)

In footnote 9 which appears on pages 15 and 16 of the brief, respondent contends that the hearing granted the petitioner on May 17, 1954, was a personal appearance under 32 C. F. R. § 1624.2 rather than a preclassification hearing as petitioner has contended. The only basis for respondent's contention is its assumption that the local board so regarded the hearing. Even if this assumption were correct, the type of hearing which was conducted is not determined by the subjective feelings of the board members, and the hearing belatedly granted in this case did not cure the conceded denial of the personal appearance at a time when it was needed by petitioner and required by law.

## CONCLUSION

**For the reasons stated in this reply, and for those appearing in the petition, the writ of certiorari should be granted.**

Respectfully submitted,

THOMAS D. MCBRIDE
2015 Land Title Building
Philadelphia 10, Pennsylvania

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

*Counsel for Petitioner*

December, 1955.

End